UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BILL R. OGDEN aka BILL R. OGDEN, SR.; CAROL J. OGDEN aka CAROL OGDEN; FIRST CITY BANK; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, Defendants.	)	**FILED** MAR 10 1994 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 93-C-761-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of March, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Rogers County, Oklahoma**, and **Board of County Commissioners, Rogers County, Oklahoma**, appear by Glenna S. Dorris, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, **First City Bank**, appears not, having previously filed its Disclaimer; and the Defendants, **Bill R. Ogden aka Bill R. Ogden, Sr.** and **Carol J. Ogden aka Carol Ogden**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Bill R. Ogden aka Bill R. Ogden, Sr.**, was served with Summons and Complaint on October 5, 1993; that the Defendant, **Carol J. Ogden aka Carol Ogden**, was served with Summons and Complaint on October 5, 1993; that the

Defendant, **First City Bank**, acknowledged receipt of Summons and Complaint on August 26, 1993; and that Defendant, Board of County Commissioners, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on August 25, 1993.

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma**, and **Board of County Commissioners, Rogers County, Oklahoma**, filed their Answer on August 31, 1993; that the Defendant, **First City Bank**, filed its Disclaimer on January 21, 1994; and that the Defendants, **Bill R. Ogden aka Bill R. Ogden, Sr.** and **Carol J. Ogden aka Carol Ogden**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot 15 in Block 4 of Walnut Park "Second" Addition, an Addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on February 13, 1981, Bill R. Ogden and Carol J. Ogden executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $36,580.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Bill R. Ogden and Carol J. Ogden executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated February 13, 1981, covering the above-described property. Said mortgage was recorded on February 13, 1981, in Book 594, Page 538, in the records of Rogers County, Oklahoma.

The Court further finds that Bill R. Ogden aka Bill R. Ogden, Sr. and Carol J. Ogden aka Carol Ogden executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

Instrument	Effective Date of Agreement
Interest Credit Agreement	June 13, 1981
Interest Credit Agreement	October 5, 1982
Interest Credit Agreement	October 23, 1984
Interest Credit Agreement	October 23, 1985
Interest Credit Agreement	October 23, 1986
Interest Credit Agreement	October 23, 1987
Interest Credit Agreement	October 23, 1988
Interest Credit Agreement	October 23, 1989
Interest Credit Agreement	October 23, 1990

The Court further finds that the Defendants, Bill R. Ogden aka Bill R. Ogden, Sr. and Carol J. Ogden aka Carol Ogden, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Bill R. Ogden aka Bill R. Ogden, Sr.** and **Carol J. Ogden aka Carol Ogden**, are

indebted to the Plaintiff in the principal sum of $30,057.79, plus accrued interest in the amount of $5,633.35 as of May 26, 1993, plus interest accruing thereafter at the rate of 12 percent per annum or $9.8820 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $31,369.70, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $18.20 ($10.20 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $ 874.06 , plus penalties and interest, for the year(s) 1992-1993 . Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $ 156.51 which became a lien on the property as of December 31, 1993 . Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien No. 87-176, recorded on October 23, 1987 and re-recorded on April 14, 1992, in the records of the Rogers County Clerk, Rogers County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Farmers Home Administration.

The Court further finds that the Defendant, **First City Bank**, disclaims any right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendants, **Bill R. Ogden aka Bill R. Ogden, Sr. and Carol J. Ogden aka Carol Ogden**, in the principal sum of $30,057.79, plus accrued interest in the amount of $5,633.35 as of May 26, 1993, plus interest accruing thereafter at the rate of 12 percent per annum or $9.8820 per day until judgment, plus interest thereafter at the current legal rate of 4.22 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $31,369.70, plus interest on that sum at the current legal rate of 4.22 percent per annum until paid, plus

the costs of this action in the amount of $18.20 ($10.20 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of $ 874.06 , plus penalties and interest, for ad valorem taxes for the year(s) 1992, 1993 , plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of $ 156.51 for personal property taxes for the year(s) 1992, 1993 , plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **First City Bank** and **Board of County Commissioners, Rogers County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Bill R. Ogden aka Bill R. Ogden, Sr.** and **Carol J. Ogden aka Carol Ogden**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of

Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of $ 874.06 , plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of $ 156.51 , plus penalties and interest, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
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GLENNA S. DORRIS, OBA #14070
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-761-B

PP:css

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK J. CHOPLIN

Plaintiff,

vs.

ASSOCIATED NATURAL GAS, INC., a Colorado corporation,

Defendant.

Case No. 93-C-1061-B

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Mark J. Choplin, and Defendant, Associated Natural Gas, Inc., by and through their respective counsel of record, hereby stipulate and agree that this action should be dismissed with prejudice. It is further stipulated by plaintiff and defendant that the parties will be responsible for their respective costs and attorney's fees.

Respectfully submitted,

Steven J. Adams
David P. Page
GARDERE & WYNNE
Suite 425
401 South Boston
Tulsa, Oklahoma 74103
(918) 560-2900

ATTORNEYS FOR PLAINTIFF, MARK J. CHOPLIN

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Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR DEFENDANT, ASSOCIATED NATURAL GAS, INC.

angi.stip./mdc

ENTERED ON DOCKET

DATE 3-10-94

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN B. STETSON COMPANY,	:	
Plaintiff,	:	
v.	:	Civil Action No. 93 C 763 E
STETSON'S INCORPORATED and RONALD K. LEE,	:	
Defendants.	:	

FILED

MAR [illegible]

Richard [illegible] Clerk
U.S. DISTRICT COURT

PERMANENT INJUNCTION AND ORDER ON CONSENT
AGAINST STETSON'S INCORPORATED

Plaintiff having brought this action for trademark infringement and counterfeiting against the defendants, and it being so agreed by and between the plaintiff and defendants, it is now

ORDERED AND ADJUDGED that:

1. This Court has subject matter jurisdiction over this action, it arising under the Lanham (Trademark) Act of 1946, 15 U.S.C. §1015 et seq., and particularly under 15 U.S.C. §1114(1) and 15 U.S.C. §1125(a) thereunder. The parties hereto are subject to the jurisdiction of this Court. Venue is proper in this judicial district.

2. Plaintiff is owner of the trademark and service mark STETSON and STETSON'S, and is the owner of valid federal U.S. registrations for the said marks.

3. Defendant Stetson's Incorporated, (sometimes known as Stetson and/or Stetsen's), its past and present directors,

officers, principals, shareholders, agents, employees and all persons in active concert and privity with them, or any of them, are permanently enjoined from:

a. Directly or indirectly infringing the plaintiff's trademark and service mark STETSON and/or STETSON'S, by using, or causing to be used, either term, alone or in conjunction with any other term or symbol, or any variant thereof, or in using or causing to be used, any term substantially similar thereto, in connection with the promotion and/or operation of a club, bar, or any other establishment, and/or on or in connection with any article of clothing, and/or any article whatsoever, and/or on any advertisement, promotional material flyer or store signage of any type, except that defendant has until March 1, 1994 to complete compliance of this Order with respect to removing exterior signage at its facility in Grove, Oklahoma. All of the other activities enjoined are enjoined forthwith, and defendant is ordered to notify the Secretary of State, and the State Liquor Authority that defendant's corporation, by this Court's Order, will no longer operate or exist under a name being or including the term STETSON, STETSON'S, STETSEN'S or any similar term or variant thereof.

4. This Court shall have continuing jurisdiction over the enforcement of this Order.

SO ORDERED:

Dated: 3/9/94, _____
U. S. D. J.

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ENTERED ON DOCKET

DATE 3-10-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE LEA GERKE,

Plaintiff,

vs.

ROGER GAUTIER, AMERICAN STATES INSURANCE COMPANY, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants.

Case No. 92-C-235-E

ORDER

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 8 day of ~~February~~ March, 1994.

S/ JAMES O. ELLISON

U.S. DISTRICT JUDGE

Prepared by:

JOHN A. GLADD OBA#3398
Attorney for Defendant
2642 East 21st, Suite 150
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(918) 744-5657

JAG:pm/2/21/94/[2/21/94]/5133.92

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA L. WOODS,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-0042-E

ORDER

Plaintiff Patricia Woods applied for Social Security disability benefits in November of 1990 due to injuries suffered in a car accident. The Secretary denied the application and Plaintiff appeals to this Court.[1]

Three issues are raised on appeal: (1) Does substantial evidence support the Secretary's finding that Plaintiff could return to sedentary work? (2) Did the Administrative Law Judge ("ALJ") improperly rely on the Medical-Vocational guidelines? and (3) Did the ALJ err by not calling a vocational expert? For the reasons discussed below, the Court affirms the Secretary's decision.

I. Procedural History/Summary of Evidence

On February 21, 1990, Plaintiff Woods fractured her right ankle in a car accident. That injury prompted Plaintiff to apply for Social Security disability benefits on November

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). That section states: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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7, 1990. *Record at 48.* On April 23, 1992, the ALJ denied benefits to Woods and found that she could return to work. *Record at 22.* The Secretary refused to review the ALJ's decision and Plaintiff now asks this Court to examine the decision.

The evidence in the Record is summarized as follows. At the time of the hearing before the ALJ, Plaintiff was 41 years old. She stood 5-foot-2 and weighed 178 pounds. She had a high school education and attended beauty school. Her previous jobs were as a cashier, line worker, dishwasher and chicken packer.[2]

At the hearing, Plaintiff testified that she could not work because of the pain in her foot. *Id. at 36.* She said that she could stand only 45 minutes to an hour at a time and has problems sitting. Plaintiff also testified that her foot consistently throbbed. *Id. at 39.*[3] She said she could only work 2 to 3 hours a day and that she would need a job where she could elevate her foot. *Id. at 41.*

The medical evidence indicates that Plaintiff underwent surgery on her ankle following the accident. Dr. Michael L. McCarty described her as stable at the time of discharge, but recommended eight weeks of immobilization. *Id. at 126, 128.* On May 10, 1990, Dr. McCarty said Plaintiff would progress to full weight bearing. On June 21, 1990, Dr. McCarty said Plaintiff was "full weight bearing" and could return to work as tolerated. *Id. at 140.*

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[2] *The ALJ found that Plaintiff could not return to any of her past jobs. Therefore, the primary question on appeal is whether she can return to work in other types of jobs.*

[3] *Plaintiff returned to work as a cashier in September of 1990. She worked for only a month, however, because the job required her to be on her feet the entire 8-hour day, frequently bend and lift 50 pounds frequently. Plaintiff's brief also discusses her other testimony.*

On February 28, 1991, Dr. John F. Rice -- the Secretary's consulting physician -- examined Plaintiff. Dr. Rice summarized the exam as follows:

> **This is a 40-year-old white female who fractured her ankle approximately 1 year before this exam. She states she still has to use her cane to get around and she did indeed present with a quad cane at our office, but did not seem to use it effectively. The ankle exam revealed a large well-healed scar over the medium malleolar area in the right ankle from apparently open reduction internal fixation of her ankle fracture. She had reduced dorsiflexion and dorsi-extension of the ankle, but no loss in inversion or eversion. Otherwise, her physical examination was essentially unremarkable...** *Id. at 145.*[4]

On January 9, 1992, Dr. J.W. Zeiders removed metal rods from Plaintiff's ankle -- which had been placed there during the 1990 operation. Dr. Zeiders stated that Plaintiff tolerated the procedure "well" and he discharged her on pain medication and splint fixation. *Id. at 155.*

II. Legal Analysis

Based on the foregoing evidence, the ALJ found that Plaintiff could return to work in a sedentary job. The question on appeal, therefore, is whether substantial evidence supports that decision. *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Upon review, the court finds that substantial evidence supports a finding of no disability. The medical evidence shows that Plaintiff was "full weight bearing" within four

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[4] *On April 1, 1991, Dr. David S. Krug stated that he believed the fracture to be healed. Id. at 149.*

months of her ankle injury. Furthermore, none of the doctors examining Plaintiff concluded that she could not work. Drs. McCarty, a treating physician, and Dr. Rice, a consulting physician, arrived at virtually the same opinion: the ankle caused Plaintiff pain, but that she still could return to work. In addition, the record indicates that Plaintiff did not seek treatment for her ankle from June of 1990 to January of 1992 -- some 18 months. This suggests that her pain was not as severe as she now claims. Plaintiff did testify at the hearing that her ankle "throbbed" and, as a result, she could not work. However, such statements are not supported by the medical evidence and, in any regard, the ALJ found the testimony not to be credible. *Record at 21.*[5] Therefore, unless the ALJ failed to correctly apply the law, the Secretary's decision will be affirmed. *Smith v. Heckler,* 707 F.2d 1284, 1285 (11th Cir. 1985).

The second issue raised by Plaintiff is the ALJ erred by finding "that the Plaintiff could work at the full range of sedentary jobs by alternatively sitting or standing." *Plaintiff's Brief at page 5.* But that argument is unclear because the ALJ did not find that Plaintiff was required to alternatively sit and stand.[6] Instead, the ALJ found that Plaintiff "**has the residual functional capacity to perform the physical exertion requirements of work except for standing or walking for more than 2 or 3 hours in an 8-hour work day, and lifting and carrying more than 20 pounds from an upright position.**(emphasis added)

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[5] *It also should be noted that, on page 93 of the Record, Plaintiff described her daily activities: "I can dress myself, I can bathe myself, I can cook for myself, I can do my housework; I can sit without problems for three hours; I can stand without problems for one hour; I can lift up to 10 pounds; I can walk 3 blocks."*

[6] *In Preston v. Secretary of Health and Human Services, 854 F.2d 815, 819 (6th Cir. 1988), the court noted that "the concept of sedentary work contemplates substantial sitting as well as some standing and walking. Alternating between sitting and standing, however, may not be within the definition of sedentary work." The undersigned does not disagree with that ruling. However, in the instant case, neither substantial evidence nor the ALJ supports the fact that Ms. Woods must alternate between sitting and standing.*

Record at 22.

That finding, supported by substantial evidence, comports with *20 C.F.R. § 404.1567,* which states:

> **Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.**

The final issue meriting discussion is whether the ALJ erred by applying the Medical-Vocational Guidelines ("Grids"). The ALJ first found that Plaintiff had the residual functional capacity ("RFC") to perform the full range of sedentary work. *Record at 22.* He then concluded that the Grids directed a finding of no disability. Id.

Plaintiff disputes that finding, arguing that the grids are not applicable because she suffered from pain and limitation of movement (i.e. nonexertional impairments). That argument, under the facts of this case, is without merit. The "mere presence" of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant. *Gossett v. Bowen*, 862 F.2d 802, 807-808 (10th Cir. 1988). Therefore, reliance on the "grids" was proper since substantial evidence supports the ALJ's finding that Plaintiff had the RFC to perform the full range of sedentary work.[7]

III. Conclusion

Plaintiff applied for Social Security benefits, claiming she was disabled from an ankle

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[7] *The testimony of a vocational expert was not required in this case. Heckler v. Campbell, 461 U.S. 458 (1983).*

injury suffered in a February, 1990 car accident. The Secretary denied benefits, concluding that Plaintiff could return to work in a sedentary job. Plaintiff now appeals that decision, claiming the Secretary erred. However, a review of the record shows that substantial evidence supports the Secretary's decision. Furthermore, the ALJ did not err in his interpretation of the law. Consequently, the Secretary's decision is **AFFIRMED.**

SO ORDERED THIS 9th day of March, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHELLY NASSIF,)
)
Plaintiff,)
)
v.) Case No. 92-C-1081-B
)
DONNA E. SHALALA, SECRETARY)
OF HEALTH AND HUMAN SERVICES,)
)
Defendant.)

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed February 3, 1994, in which the Magistrate Judge recommended that the final decision of the ALJ be reversed and that Plaintiff be found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223, and supplemental security income under §§ 1602 and 1614(a)(3)(A). No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that the decision of the ALJ is reversed and Plaintiff is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223, and supplemental security income under §§ 1602 and 1614(a)(3)(A).

Dated this 10th day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROLLIE A. PETERSON, an individual, and SUSAN P. PETERSON, an individual,

Plaintiffs,

vs.

NANCY WALENTINY, HUGH V. RINEER, C. MICHAEL ZACHARIAS, SHARON L. CORBITT, RINEER, ZACHARIAS & CORBITT, a partnership, JEAN A. HOWARD, MARIAN B. HOWARD, SHARON DOTY, ROBERT W. BLOCK, M.D., and UNIVERSITY OF OKLAHOMA,

Defendants.

No. 93-C-399-B

ORDER SUSTAINING MOTION TO DISMISS OF DEFENDANT, ROBERT W. BLOCK

The motion to dismiss of Defendant, Robert W. Block, M.D., (Docket # 22), is before the Court for decision concerning Plaintiff's alleged libel action in the third cause of action of Plaintiff's Second Amended Complaint filed July 12, 1993. The original complaint was filed April 30, 1993, followed by a first amended complaint on June 22, 1993.

The libel action arises out of Plaintiff, an attorney, and Defendant Jean A. Howard's previous marriage. Two children were born of the marriage, one Kristen, age 4 years. The divorce was hotly contested and child custody differences have persisted. In 1991, the Defendant Howard began to suspicion that the minor, Kristen, had been sexually abused, based upon various sex-related and suggestive remarks made by Kristen. Her mother, Howard, took

Kristen to counseling to determine if she had been sexually abused and by whom. Most of the time when Kristen mentioned sexual abuse she referred to "Uncle Duke" and only infrequently mentioned her father, the Plaintiff, in such counseling sessions.

Following are the pertinent allegations against the Defendant, Robert W. Block, M.D.:

> "2.18. On March 16, 1992, Kristen was examined by Dr. Block, a pediatrician who specializes in child sexual abuse, teaches pediatric medicine at the University of Oklahoma College of Medicine and serves as the medical director of the JUSTICE Center in Tulsa, Oklahoma. Dr. Block was told that the "suspect" and alleged perpetrator of sexual abuse on Kristen was the child's father, Plaintiff Peterson. Not one word was ever mentioned to Dr. Block of Kristen having initially and consistently named "Uncle Duke" as the perpetrator of acts which caused concern of possible sexual abuse. For this reason, Dr. Block inquired of Kristen about only what happened during her visits with her father in California and not about what Uncle Duke might have done. Dr. Block conducted a thorough physical examination, including a vaginal exam using a colposcope which, by use of light and magnification, allows the physician to see the aspects of the vaginal anatomy which could not be observed with the unaided eye. The results of Dr. Block's physical examination were completely normal. Further, Dr. Block has testified that based upon what Kristen told him and the results of his physical examination, he did not feel obligated to report a suspicion of abuse to the D.H.S. because he could not form and had not formed a suspicion as to whether Kristen had been sexually abused or the identity of any possible perpetrator.
>
> * * *
>
> "5.3. On or about March 13, 1992, Defendant Howard, and Defendant Doty caused to be published a report with Dr. Block and staff of the University of Oklahoma known as an intake sheet and as a data form stating that Plaintiff Peterson is a sexual abuser of the Minor Children (hereafter "Data Form"). A true and correct copy of the Data Form is attached to the original complaint as Exhibit "A" and made a part hereof.
>
> "5.4. On or about March 18, 1992, Defendant Howard caused to be published a police report, which is attached

to the original complaint as Exhibit "B" and made a part hereof (hereafter "Police Report").

"5.5. The entirety of both the Data Form and the Police Report are false as they pertain to Plaintiff Peterson in the context as a sexual offender.

"5.6. These reports are libelous on their face and they clearly expose Plaintiff Peterson to hatred, contempt, ridicule, and obloquy because of the insidious nature of such allegations.

"5.7. The Data Form has been seen and read by Judy Rickman, Dr. Block, and by other University of Oklahoma personnel, and the Police Report by Detective Lawmaster, City of Tulsa attorneys, and other persons whose names are now not known to Plaintiff Peterson.

"5.8. In addition thereto, Peterson is informed and believes that Block has disseminated the Data Form for persons not now known to Plaintiff Peterson for personal research purposes and maintains the Data Form in files, where it is the subject of review by persons at this time unknown to Peterson.

* * *

"5.10. The libelous statements were published by the Defendants with malice, oppression and fraud . . ."

(Second Amended Complaint filed July 12, 1993).

The following statutory references of the State of Oklahoma demonstrate a strong public policy to provide for the protection of children from suspected child abuse and grant immunity from civil or criminal liability to those persons participating in good faith and exercising due care in making reports concerning such investigations.

Okla. Stat. tit. 21, § 845. Public policy--Protection of children--Definitions

"A. It is the policy of this state to provide for the protection of children who have had physical injury inflicted upon them and who, in the absence of appropriate reports concerning their condition and circumstances, may be further threatened by the conduct

of persons responsible for the care and protection of such children.

* * *

Okla. Stat. tit. 21, § 846. Mandatory reporting of physical abuse, sexual abuse, neglect or birth of chemically-dependent child--Investigations--Spiritual treatment of child through prayer--Appointment of attorney for child

"A. 3. Every physician or surgeon making a report of abuse or neglect as required by this subsection or examining a child to determine the likelihood of abuse, sexual abuse, or neglect and every hospital or related institution in which the child was examined or treated shall provide copies of the results of the examination or the examination on which the report was based and any other clinical notes or records relevant to the case to law enforcement officers conducting a criminal investigation into the case and to employees of the Department of Human Services conducting an investigation of alleged abuse or neglect in the case.

* * *

Okla. Stat. tit. 21, § 847. Immunity from civil or criminal liability

"Any person participating in good faith and exercising due care in the making of a report pursuant to the provisions of Section 846 or 846.1 of this title, or any person who, in good faith and exercising due care, allows access to a child by persons authorized to investigate a report concerning the child shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report."

Plaintiffs' allegations of fact against pediatrician, Dr. Block, clearly indicate a good faith examination and physician-patient relationship with the minor child and her mother. Then Plaintiffs inject conclusory allegations of "malice, oppression, and fraud," absent any supporting factual allegations. Fed.R.Civ.P. 9(b) requires that allegations of fraud be "stated

with particularity." Dr. Block's alleged publication of the defamatory matter is general, by "information and belief" only, bereft of particularized factual support. Absent is any specific allegation of what, when, where and to whom such defamatory statements were made by Dr. Block. In view of Oklahoma's strong public policy imposing a duty of physician communication, and a grant of physician immunity (Okla.Stat. tit. 21, § 847), stating facts with particularity in the instant matter is a necessary predicate to overcoming a Fed.R.Civ.P. 12(b)(6) motion. Existing authority requires allegations of defamation at a minimum to state what, when, where, and to whom such communications were made, in order to allow defendant to defend. McGeorge v. Continental Airlines, Inc., 871 F.2d 952, 955 (10th Cir. 1989); Gentry v. Hopkins, Civ. A. No. 87-4327-S, 1989 WL 161439 at *3 (D. Kan. Dec. 19, 1989); Schulze v. Coykendall, 545 P. 2d 392, 396 9 Kan. 1976); and Wright & Miller, Federal Practice and Procedure: Civil, § 1309, p. 441.

Okla. Stat. tit. 12, § 95(4) provides for a one year statute of limitation in libel actions. The complaint alleges pediatrician, Dr. Block, conducted his good faith examination of the minor, Kristen, in March 1992, at which time he communicated his findings. Such communication involved both the physician-patient qualified immunity as well as the above-quoted statutory immunity. There is no specific allegation of wrongful or libelous communication by the Defendant, Dr. Block, within the year from April 30, 1992 to April 30, 1993, when Plaintiffs first commenced the action. There is no need to address Plaintiffs' date of discovery argument because the

second amended complaint fails to state a cause of action against the Defendant, Dr. Block, as stated above.

Plaintiffs' second amended complaint fails to allege sufficient facts under Oklahoma law to state a cause of action against the Defendant, Robert W. Block, M.D., in libel. Thus, Defendant Block's Rule 12(b)(6) motion to dismiss is hereby sustained with prejudice. Plaintiffs' request to file a third amended complaint against the Defendant Block is hereby denied. The parties' applications for Rule 11 sanctions and costs and attorneys fees are hereby denied.

DATED this 10th day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-10-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
NORMA R. HOLT,	)	Bky. No. 88-03519-C
	)	
Debtor.	)	
	)	
UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE,	)	Adversary No. 91-00350-C
	)	
Appellant,	)	
	)	
v.	)	Case No. 93-C-104-E
	)	
NANETTE HOLT PRICE, AS CONSERVATOR FOR NORMA R. HOLT AND NORMA R. HOLT, DEBTOR-IN-POSSESSION,	)	
	)	
Appellees.	)	

FILED

MAR 09 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to the appeal of the United States of America from the Order denying the United States' Motion for Summary Judgment entered on October 2, 1992 and the Order Sustaining the Objection to Proof of Claim of the Internal Revenue Service ("IRS") entered on January 26, 1993 by the Bankruptcy Court for the Northern District of Oklahoma.

Debtor is a sixty-one year old woman who was married for over thirty years to Jack Holt, the owner and operator of two telephone companies, Grand Telephone Company and Oklahoma Telephone & Telegraph ("OT&T") in Stilwell, Oklahoma. When Jack Holt became afflicted with Alzheimer's disease, OT&T was turned over to her and their children. She began seeing a psychiatrist on a regular basis for depression when her husband became ill, since she had always depended upon the men in her life to take care of her and make

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decisions. She divorced him in 1976, supposedly at a doctor's recommendation. When he died in November of 1984, she was the majority stockholder in OT&T and a substantial stockholder in Grand Telephone Company.

After Jack's death, Debtor tried to take an active role in OT&T, but she could not run the business properly. The business was sold in late 1986 and early 1987 and she received over $2,000,000.00 from the sale of her stock. She owed the IRS a capital gains tax on the sale, and that tax is claimed in this case by the IRS.

On November 16, 1988, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. On December 13, 1988, the IRS filed a proof of claim for income taxes, penalties and interest for the year 1986 in the amount of $573,258.56. On December 13, 1991, Debtor filed a complaint pursuant to sections 505(a)(1) and 346(i)(1)(C) and (F) of the Bankruptcy Code, asking that this court disallow the claim of the IRS and order a refund of taxes overpaid prior to bankruptcy. She contended that Frank B. Carson, Jr. ("Carson") had obtained over $2,000,000.00 by theft from her during the years 1985, 1986 and 1987, and that she was entitled to claim a theft loss on either her 1987 or 1988 tax return. She had filed amended income tax returns for those years and claimed a refund of $191,800.00 if the loss was allowed for 1987 or $90,869.00 if the loss was allowed for 1988.

The IRS denied her theft loss claim in total, denied that she was entitled to any refund, and insisted that its claim for unpaid income taxes for the year 1986 be allowed in full. The parties filed trial briefs and a five-day trial was held. The court denied the United States' Motion for Summary Judgment on October 2, 1992 and sustained Debtor's

objection to the IRS' claim on January 26, 1993.

At trial, the court heard evidence that Carson was a banker and businessman in Stilwell during the time Debtor and her former husband lived there. He was the majority stockholder of First State Bank ("FSB") in Tahlequah, Oklahoma, although most of the stock was held in his daughters' names. He used his position as majority stockholder to his personal advantage, ultimately becoming involved in a check kiting scheme involving several banks. As a result of a pending investigation by bank examiners in 1983, he agreed to end his involvement with FSB by selling his stock and ending all business relations.

Despite his agreement, Carson did not sell his stock until 1988 and did not cease his borrowing activities. However, he closed his account at the bank, and continued borrowing money over the limit allowed by state law by having other people take out loans for him in their names. He was also involved in a number of other businesses, none of which were profitable, and owned some real estate, but it was heavily mortgaged. By 1985, his business enterprises had failed or were not producing income, his borrowing had reached its limit, and he was more than $2,000,000.00 in debt.

Carson and Debtor had known each other for years. Carson and her former husband had done business together in the past, and Debtor and Carson had been romantically involved in the mid-1960s for a period of time. They had little contact after that until Debtor's former husband died. Following the death, Carson contacted her allegedly to express his condolences. Coincidently, at that time he was having dire financial difficulties, and he knew that she planned to sell her stock in OT&T and would receive approximately $2,000,000.00 from the sale. Carson also knew that Debtor had been under the care of

a psychiatrist for many years and that she could be easily manipulated. When they began spending time together, she told him that her children wanted to have her committed or to appoint a conservator to act on her behalf.

Debtor turned to Carson for companionship. She saw him as a man of influence and wealth, and when she sold her OT&T stock she wanted a replacement business. He indicated that he had a way to make money and could save her over $200,000.00 on her income taxes arising out of the sale of the OT&T stock. He made vague references about acquiring stock for her in his bank and placing her on the board and of obtaining an abstract company for her. Carson told Debtor not to tell her children about their dealings, so she became very secretive towards them. She began transferring funds to him in various amounts totaling $2,051,090.00. None of the transfers were documented and no promissory notes evidenced that Carson had received the money. In spite of this, it was always understood, either explicitly or implicitly, that Debtor's money would be returned to her any time she wished.

All of the checks were written at Carson's request and in the form and manner dictated by him. The details surrounding the various transfers were revealed at trial, although Debtor's recollections of them were vague. On November 21, 1985, Debtor wrote a check payable to Sue Martin, Carson's secretary, for $15,000.00, and gave it to Martin in a Sheraton Hotel parking lot in Tulsa, Oklahoma. Ms. Martin cashed the check and gave the money to Carson. On December 31, 1985, Debtor met Carson at a gas station outside of Tahlequah, Oklahoma and gave him a check for $94,000.00 payable to her, which she had endorsed. He deposited the check into his account at Phoenix Federal Savings & Loan

and used the money to pay his debts.

On March 18, 1986, Debtor wrote a check on Carson's behalf payable to Charles Hawkins for $21,000.00 to repay a debt Carson owed Hawkins. On August 25, 1986, she wrote a $30,000.00 check payable to herself, which she endorsed and gave to him to pay his debts. On November 5, 1986, she borrowed $210,000.00 and used the first $150,000.00 of the loan to cover a third-party check Carson had cashed which had been returned for insufficient funds. The remaining $60,000.00 was converted into a cashier's check in her name, endorsed, and given to Carson to be used to repay all but $90,000.00 on the above loan, so she claims a theft only in this amount.

On November 26, 1986, Debtor gave Carson's secretary a check payable to Debtor in the amount of $1,369,090.00 and endorsed by her in blank. The money was a portion of her proceeds from the sale of her OT&T stock. In June of 1986, Carson had been indebted to First National Bank on four different notes secured by real estate in the amount of $842,556.45, which were overdue. Carson persuaded Debtor to meet with Robert Hollis, Chairman of the Bank's Board, and a friend and business associate of Carson's, and borrow $842,556.45 from the bank to pay off Carson's notes at the bank. The bank assigned the notes and the real estate mortgages securing them to Debtor and she then pledged them to the bank to secure her debt. As a result of this transaction, Carson owed Debtor $842,556.45, which was secured by the real estate mortgages. She in turn owed the bank that amount, which was also secured by the same mortgages. The parties agreed that she would repay the debt to the bank when she received the proceeds from the sale of the OT&T stock. The sale took place on November 26, 1986, and she immediately went

to Carson's office to deliver her check. Part of the $1,369,090.00 was used to pay off her debt to the bank in the amount of $804,440.23. The remaining $564,649.77 was used to pay off various debts of Carson.

After the payment of Debtor's debt to the bank, it released the mortgages on the real estate which secured her claim against Carson, making her an unsecured creditor of Carson's. The mortgages were released because the assignment of the mortgages from the bank to Debtor had never been recorded, and public records showed the bank as mortgagee. The bank delivered the releases of the mortgages to Carson's secretary, and Carson sold the real estate for approximately $520,000.00 and used the money to pay debts rather than paying Debtor.

On January 13, 1987, Debtor wrote a check for $32,000.00 payable to herself, which she endorsed and gave to Carson to pay off debts. On February 26, 1987, she received the remaining distribution of $550,908.00 from the sale of her OT&T stock and wrote four checks totaling $400,000.00 to pay various creditors of Carson.

Debtor testified that the money she transferred to Carson was supposed to be invested for her to make more money. She said it was always understood that the money was to be returned to her upon request. Carson testified that the money was loaned to him because he was in financial difficulty and that he always intended to repay her. Both parties obviously believed that it was to be repaid when needed.

Finally in late March of 1987, Debtor asked Carson for $440,000.00 to pay her 1986 taxes. Only then did he tell her that he did not have the money. Despondent, Debtor attempted suicide on April 7, 1987. While she was recovering in the hospital,

Carson told her to write the check to the IRS and he would get the money. She wrote the check, but it was subsequently dishonored. She never received the money from Carson with which to pay her taxes.

When Debtor's children discovered that her money from the sale of the OT&T stock and additional savings were missing, she explained that she had given it to Carson to make more money for her. She could not recall the details as to how he was to do so other than vague references to ownership of a bank and an abstract company.

At the trial, Debtor's psychiatrist, Dr. Charles Cobb, testified that she had psychiatric problems which may have prevented her from recalling the details of these transactions. He diagnosed her with three disorders, major depression, attention deficit disorder and dependent personality, all of which would have inhibited her ability to function normally and prevented her from making rational decisions.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. In re Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

In its appeal, the IRS argues that the Bankruptcy Court erred in finding that Carson's conduct amounted to larceny, because it was not proven that Debtor intended to part with

title to her money or made representations that he would secure her an interest in a bank or abstract company or act as her financial advisor. The IRS argues that, since Debtor's testimony was limited to facts she "believed" or "understood," not to specific details, there was insufficient evidence to establish the existence of fraud.

The IRS also contends that Debtor did not "discover" the theft loss in 1987, and that the Bankruptcy Court erred in relying on the objective test set out in Cramer v. Commissioner, 55 T.C. 1125 (1971), and should have based its decision on when Debtor's attorney actually discovered the theft in February of 1990. The IRS also claims the Bankruptcy Court erred in finding that Debtor had no reasonable prospect of recovery as of December of 1987, since she later filed lawsuits against Carson and First National Bank to recover the deducted loss.

The Bankruptcy Court had jurisdiction to determine this matter under 28 U.S.C. § 1334(b) and (d), as this was a core proceeding under 28 U.S.C. § 157 and there was authority to determine the legality and amount of any tax claim under 11 U.S.C. § 505(a)(1). A debtor's estate succeeds to all debtor's tax attributes. 11 U.S.C. § 346(i)(1). Under 11 U.S.C. § 541, the debtor's estate consists of all the debtor's legal and equitable interest in property including a tax refund.

The Internal Revenue Code, Title 26 of the United States Code, provides that a taxpayer may take a tax deduction for a loss from theft in the taxable year in which he discovers the loss.[1] Whether a theft has occurred for purposes of § 165(e) depends on the

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[1]Under 26 U.S.C. § 165, a taxpayer may take a theft deduction in certain circumstances:

Losses.

(a) General rule. --There shall be allowed as a deduction any loss sustained during the taxable

law of the state where the loss occurred. Bellis v. Commissioner, 540 F.2d 448, 449 (9th Cir. 1976). The term "theft" as used in § 165(e) is defined broadly; it is a word of general and broad connotation, "intended to cover and covering any criminal appropriation of another's property to the use of the taker, particularly including theft by swindling, false pretenses and any other form of guile." Edwards v. Bromberg, 232 F.2d 107, 110 (5th Cir. 1956). Under 26 C.F.R. § 1.165-8(d) theft includes larceny, embezzlement and robbery.

A theft loss is not deductible in the year of discovery if at that time there exists a reasonable prospect of recovery.

> If in the year of [discovery], there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received.

26 C.F.R. § 1.165-1(d)(2)(i) and § 1.165-8(a)(2). The test is whether there was a reasonable prospect of recovering the loss at the time the deduction is claimed, not later. Rainbow Inn, Inc., v. Commissioner, 433 F.2d 640, 644 (3rd Cir. 1970).

Under the Oklahoma Penal Code, Okla. Stat. tit. 21, § 1 et seq., there is no prohibited behavior referred to as "theft." Instead, the taking of the property of another is found to be unlawful as either embezzlement or larceny by fraud. Embezzlement is defined as "the fraudulent appropriation of property by a person to whom it has been entrusted." Okla. Stat. tit. 21, § 1451. Larceny is defined as "the taking of personal

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year and not compensated for by insurance or otherwise.

. . .

(e) Theft loss. --For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

property accomplished by fraud or stealth, and with intent to deprive another thereof." Okla. Stat. tit. 21, § 1701. Larceny is committed if a person intends to steal another's personal property and obtains possession of it, by means of fraud or trick, even if the owner consents. Hagan v. State, 134 P.2d 1042, 1049 (Okla. Crim. App. 1943). A promise to do something in the future which the promisor does not intend to keep is larceny by fraud. Lamascus v. State, 516 P.2d 279, 281 (Okla. Crim. App. 1973). Obtaining money by fraud is theft under Oklahoma law. Abbott v. State, 149 P.2d 514 (Okla. Crim. App. 1944), modified, 155 P.2d 267 (1945).

The issue before the Bankruptcy Court was whether Debtor was entitled to a theft loss deduction on either her 1987 or 1988 federal income taxes and therefore owed no taxes for the year 1986 and was entitled to a refund of taxes paid. This court concludes that the Bankruptcy Court correctly found that she was entitled to such a deduction.

The Bankruptcy Court concluded that Carson's testimony was vague and lacked credibility. He was impeached on numerous occasions and denied knowing facts that he had to have known. For example, Carson initially maintained that Debtor had given him the money as a gift, but by the time of trial he testified that the transfers were loans that he intended and was expected to repay, although no specific terms of repayment or interest were discussed. The Bankruptcy Court noted that Carson's financial statements prepared during the relevant time period were inaccurate and misleading and he overvalued property and undervalued or omitted debts. Despite Carson's contention that the transfers from Debtor were "loans," he never listed the obligations on any financial statement. Carson's financial statement dated March 1, 1987, which was introduced at trial, showed a net

worth of $1,155,800.00, but was reconstructed to include the true value of his property and amount of his debts, including that owed to Debtor, and showed a negative net worth of $1,879,590.00. Although Carson claimed he intended to repay Debtor, he paid his own debts when he received money, such as from the sale of the real estate after the bank released the mortgages.

The Bankruptcy Court correctly determined that there was a theft by larceny pursuant to 21 O.S. 1991 § 1701, as Carson used fraud and stealth to obtain Debtor's money. When he contacted Debtor, he was hopelessly insolvent, his bank stock was mortgaged, and he knew that she was going to sell her stock in OT&T and receive a substantial sum from the sale. He led her to believe that he could make money for her when he had no intention of doing so, but planned all along to pay his own debts with the funds. He made misrepresentations that led Debtor to believe that he was acting as her financial advisor, such as the possibility of acquiring stock in his bank and abstract company, when in fact his stock was mortgaged for over $750,000.00 and he never owned an abstract company. He also led her to believe that she could have her money back any time she wished, although he knew that he could not return it to her.

The transactions were kept secret, done with great speed, and took place in out-of-the-way locations such as parking lots and his private office, and nothing was in writing. No security was given to Debtor to secure repayment, except the mortgages which were later released by the bank. None of the checks were made payable to him, but rather were made payable to Debtor or to third parties at his direction. All of the money was used to pay off his personal debts; none was used to produce new income for her.

The Bankruptcy Court correctly found no merit to Carson's argument that there was no theft because Debtor voluntarily gave him the money with no limitations on its use. Debtor parted with her money based upon his false representations that he could make more money for her. Carson was an experienced banker and businessman, and Debtor was inexperienced in financial matters, emotionally unstable, and easily manipulated. She relied on his knowledge and experience and placed her trust and confidence in him. This created a fiduciary relationship between the parties, which Carson breached.

The Bankruptcy Court properly found that Debtor should have discovered the theft in 1987. A loss is considered to be discovered "when a reasonable person in similar circumstances" would have discovered the theft. Cramer v. Commissioner, 55 T.C. at 1134. The parties agreed in the pre-trial order that this objective standard was applicable.

A reasonable person would have discovered that a theft occurred in April 1987. At that time, Debtor had received no return on her "investments" with Carson, and she asked him to return her money so that she could pay her taxes and he could not do so. Shortly thereafter she attempted suicide and he told her to write a check for her taxes and he would cover it, but he did not do so and it was returned for insufficient funds. Having no written proof that Carson had received money and no security against him for the money, a reasonable person would have known that she had been defrauded.

Debtor had no reasonable prospect of recovering the money in 1987, as Carson was hopelessly insolvent and had no means to repay her. In Ramsay Scarlett & Co. v. Commissioner, 61 T.C. 795, 811-12 (1974), aff'd, 521 F.2d 786 (4th Cir. 1975), the court said:

> A reasonable prospect of recovery exists when the taxpayer has bona fide claims for recoupment from third parties or otherwise, and when there is a substantial possibility that such claims will be decided in his favor. The standard for making this determination is an objective one, under which this Court must determine what was a 'reasonable expectation' as of the close of the taxable year for which the deduction is claimed. The situation is not to be viewed through the eyes of the 'incorrigible optimist,' and hence, claims for recovery whose potential for success are remote or nebulous will not demand a postponement of the deduction. The standard is to be applied by foresight, and hence, we do not look at facts whose existence and production for use in later proceedings was not reasonably foreseeable as of the close of the particular year. Nor does the fact of a future settlement or favorable judicial action on the claim control our determination, if we find that as of the close of the particular year, no reasonable prospect of recovery existed. (Citations omitted).

Although Debtor brought suit against First National Bank for the wrongful release of the mortgages she held against Carson's property in November of 1989, in 1987, when the deduction was claimed, there was no reasonable prospect of recovery from the bank. Even now, as the Bankruptcy Court noted, there is no reasonable prospect of collecting from the bank, since it merely followed Debtor's instructions in releasing the mortgages back to Carson. If Debtor should recover any portion of the theft loss from the bank, the IRS will be fully compensated under 26 U.S.C. § 111, which requires a taxpayer who claims a loss deduction and later recovers part or all of the loss in a subsequent year to list the recovery as gross income in the subsequent year.

The Bankruptcy Court correctly found that Debtor was entitled to a theft loss deduction on her 1987 income taxes because she had proven by a preponderance of the evidence that there was a theft by larceny under Oklahoma law, a reasonable person would have discovered the theft in 1987, and there was no reasonable prospect of recovery in that year.

The order denying the United States' Motion for Summary Judgment entered on October 2, 1992 and the Order Sustaining the Objection to Proof of Claim of the Internal Revenue Service and granting Debtor a tax refund in the amount of $191,800.00 entered on January 26, 1993 are affirmed.

Dated this 8th day of March, 1994.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

N:Holt.or

ENTERED ON DOCKET
DATE 3-10-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY FRANK WARD; ALICE FAYE WARD; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, Defendants.	)	FILED MAR 09 1994 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 93-C-685-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8th day of March, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma**, appear by Bill M. Shaw, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, **Timothy Frank Ward and Alice Faye Ward**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Timothy Frank Ward**, was served with Summons and Complaint on October 4, 1993; that the Defendant, **Alice Faye Ward**, was served with Summons and Complaint on October 4, 1993; and that Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, acknowledged receipt of Summons and Complaint on August 3, 1993.

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners,**

Rogers County, Oklahoma, filed their Answer on or about August 13, 1993; that the Defendants, **Timothy Frank Ward and Alice Faye Ward**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot 1 in Block 2 of Walnut Park II Addition, an Addition to the City of Claremore, Oklahoma, according to the recorded Plat thereof, Rogers County, Oklahoma.**

The Court further finds that on December 28, 1988, the Defendants, Timothy Frank Ward and Alice Faye Ward, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $36,000.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Timothy Frank Ward and Alice Faye Ward, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated December 28, 1988, covering the above-described property. Said mortgage was recorded on December 28, 1988, in Book 798, Page 819, in the records of Rogers County, Oklahoma.

The Court further finds that the Defendants, Timothy Frank Ward and Alice Faye Ward, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Timothy Frank Ward and Alice Faye Ward**, are indebted to the Plaintiff in the principal sum of $36,156.92, plus accrued interest in the amount of $5,484.89 as of May 26, 1993, plus interest accruing thereafter at the rate of 9.5 percent per annum or $9.4107 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $65.50 ($57.50 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $290.97, plus penalties and interest, for the year 1993. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $21.40, plus penalties and interest, for the year 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Department of Housing and Urban Development has a lien upon the property by virtue of an Assignment of Mortgage of Real Estate from Union Bank and Trust Company to the Department of Housing and Urban Development, dated May 21, 1992, and recorded on May 26, 1992, in Book 0882, Page 561 in the records of the Rogers County Clerk, Rogers County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Department of Housing and Urban Development is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Department of Housing and Urban Development.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendants, **Timothy Frank Ward and Alice Faye Ward**, in the principal sum of $36,156.92, plus accrued interest in the amount of $5,484.89 as of May 26, 1993, plus interest accruing thereafter at the rate of 9.5 percent per annum or $9.4107 per day until judgment, plus interest thereafter at the current legal rate of 4.27 percent per annum until paid, plus the costs of

this action in the amount of $65.50 ($57.50 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of $290.97, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of $21.40, plus penalties and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Timothy Frank Ward and Alice Faye Ward**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise

and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of $290.97, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of $21.40, plus penalties and interest, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-685-E

WDB:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RACHEL E. ALLRED, a single person;
GARY R. ALLRED, a single person;
CITY OF BROKEN ARROW, OKLAHOMA, a municipal corporation;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. **92-C-529-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of March, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **Gary R. Allred**, appears by his attorney Paul E. Simmons; the Defendant, **City of Broken Arrow, Oklahoma, a municipal corporation**, appears by its attorney Michael R. Vanderburg; and the Defendant, **Rachel E. Allred**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Rachel E. Allred**, acknowledged receipt of Summons and Complaint on July 19, 1992; that the Defendant, **Gary R. Allred**, was served with Summons and

Complaint on August 11, 1993; that the Defendant, **City of Broken Arrow, Oklahoma, a municipal corporation**, acknowledged receipt of Summons and Complaint on July 1, 1992; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 1, 1992; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on June 30, 1992.

It appears that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, filed its Answer on July 20, 1992 and Amended Answer on July 21, 1992; that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, filed its Answer on July 20, 1992; that the Defendant, **City of Broken Arrow, Oklahoma, a municipal corporation**, filed its Answer on or about July 6, 1992; that the Defendant, **Gary R. Allred**, filed his Answer on or about August 20, 1993; and that the Defendant, **Rachel E. Allred**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Thirteen (13), Block Two (2), LELAND ACRES ADDITION, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on August 17, 1978, the Defendants, Gary R. Allred and Rachel E. Allred, executed and

delivered to Turner Corporation of Oklahoma, Inc., their mortgage note in the amount of $32,450.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Gary R. Allred and Rachel E. Allred, executed and delivered to Turner Corporation of Oklahoma, Inc., a mortgage dated August 17, 1978, covering the above-described property. Said mortgage was recorded on August 21, 1978, in Book 4348, Page 584, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 17, 1989, Turner Corporation of Oklahoma, Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on March 21, 1989, in Book 5173, Page 322, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 13, 1987, Gary R. Allred and Rachel E. Allred were granted a decree of divorce from one another in Tulsa County District Court Case Number FD 86-3279 and as a part of such decree the above-described property was awarded to the Defendant, Rachel E. Allred, as her separate property; however, such decree was never recorded in the land records of the Tulsa County Clerk so as to legally convey title to Rachel E. Allred. No quitclaim deed from Gary R. Allred has apparently been obtained.

The Court further finds that the Defendants, Gary R. Allred and Rachel E. Allred, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Defendants, **Gary R. Allred and Rachel E. Allred**, are indebted to the Plaintiff in the principal sum of $41,782.80, plus interest at the rate of 9.5 percent per annum from July 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $31.00 which became a lien on the property as of 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma, a municipal corporation**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of Leland Acres Addition.

The Court further finds that the Defendant, **Gary R. Allred**, disclaims any right, title or interest in the real property involved in this cause, same having been conveyed by

the Decree of Divorce in Case No. FD-86-3279 of the Tulsa County District Court, State of Oklahoma.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Gary R. Allred and Rachel E. Allred**, in the principal sum of $41,782.80, plus interest at the rate of 9.5 percent per annum from July 1, 1992 until judgment, plus interest thereafter at the current legal rate of 4.22 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $31.00, plus penalties and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma, a municipal corporation**, has no right, title or interest in the subject real

property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of Leland Acres Addition.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma,** has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Gary R. Allred and Rachel E. Allred,** to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $31,00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 92-C-529-B

NBK:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES ENOCH BROWN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 93-C-609-B

ORDER

At issue before the Court in this habeas corpus action is petitioner's motion for the appointment of counsel.

After carefully reviewing the record in this case, the court denies petitioner's motion for the appointment of counsel. See McCarthy v. Weinberg, 753 F.2d 836, 838-39 (10th Cir. 1985) (the district court is vested with broad discretion in determining whether to appoint counsel). A litigant in a civil case has no constitutional right to appointed counsel. Durre v. Dempsey, 869 F.2d 543, 547 (10th Cir. 1989).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's motion for the appointment of counsel [docket #14] is **denied**; and

(2) Petitioner may file a reply to respondent's response [docket #8] no later than fifteen (15) days from the date of entry of this order.

SO ORDERED THIS 8th day of Mar., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

QUINION R. LEIGH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-703-B
	)	
L. L. YOUNG,	)	
	)	
Respondent.	)	

ORDER

At issue before the court in this habeas corpus action is respondent's motion to dismiss.

In this proceeding, petitioner challenged a March 1991 drug conviction, No. CF-90-1289, on the ground that it was indirectly enhanced by a constitutionally infirm 1967 armed robbery conviction. He alleged that the 1967 conviction affected three of his former convictions (a 1971 conviction for the Unauthorized Use of a Motor Vehicle, No. CRF-71-01445; a 1980 conviction for Carrying a Firearm After Former Conviction of a Felony, No. CRF-80-01649; and a 1986 conviction for Uttering a Forged Instrument, No. CRF-86-2831) which in turn were relied on to enhance his current sentence. Petitioner further alleged that his 1991 drug conviction was enhanced on the basis of a 1976 conviction for robbery with a firearm, No. CRF-76-0087, which had been reversed and dismissed in 1978.

In his response, petitioner argued that he had met the "in custody" requirement because his second, third, and fourth prior convictions were "tainted by the first conviction, thus, making each of the following convictions fruit of the poisonous tree."

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DISCUSSION

It is undisputed that a petitioner may challenge his present sentence to the extent that it has been enhanced by an allegedly invalid prior conviction. Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990), cert. denied, 111 S.Ct. 212 (1990). A petitioner, however, has the burden to "make clear that his current sentence ha[s] been enhanced by the expired conviction that he [seeks] to challenge." Id. To meet this burden, "the petitioner only needs to show that if he prevails in challenging his prior expired convictions, the sentence that he is currently serving will be reduced." Collins v. Hesse, 957 F.2d 746, 748 (10th Cir. 1992).

After carefully reviewing the record, the court concludes that it lacks jurisdiction to review petitioner's 1967 conviction. Even if petitioner's 1967, 1976, and 1980 convictions were invalid, the trial court still had two convictions on which to enhance petitioner's 1991 sentence: the 1971 conviction for the Unauthorized Use of a Motor Vehicle and the 1986 conviction for Uttering a Forged Instrument. See Okla. Stat. tit. 21, § 51(B) (only two prior convictions are necessary to maximize enhancement under this section). The fact that petitioner's 1971 conviction was improperly enhanced by the 1967 conviction does not render that conviction constitutionally infirm. It is the presence of the 1971 conviction, not the sentence imposed, that was used to enhance petitioner's 1991 sentence. Nor does the fact that "the threat of the invalid prior convictions" forced petitioner to plead guilty to his 1986 conviction render that conviction constitutionally infirm

for enhancement purposes. Although the petitioner may have pleaded guilty to avoid a harsher sentence, he does not dispute that he committed the charged felony offense and was convicted of same.

Therefore, the court dismisses petitioner's application for a writ of habeas corpus because the petitioner has not met his burden of proving that his current sentence has been enhanced by the expired 1967 conviction that he seeks to challenge.

ACCORDINGLY, IT IS HEREBY ORDERED that respondent's motion to dismiss [docket #5] be **granted** and that petitioner's application for a writ of habeas corpus be **dismissed** for lack of jurisdiction.

SO ORDERED THIS 8 day of May, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA for the use and benefit of BRAZEAL MASONRY, INC., an Oklahoma Corporation,

Plaintiff,

vs.

NATIONAL INTERIOR CONTRACTORS, INC., a corporation; WESTCHESTER FIRE INSURANCE COMPANY,

Defendants,

WESTCHESTER FIRE INSURANCE COMPANY,

Third Party Plaintiff,

vs.

PETER M. DAIGLE and GRACE M. DAIGLE, individuals,

Third Party Defendants.

Case No. 93-C-1008-B

O R D E R

Now before the Court are the Motion to Dismiss Pursuant to Rule 12(b)(3) (Docket #7) and the Motion For Change of Venue (Docket #8) filed *pro se* by third party Defendants Peter and Grace Daigle ("the Daigles"). This action arises from a construction contract between the United States and National Interior Contractors, Inc. ("National") for the renovation, modernization and addition to the United States Marshall's office in Tulsa, Oklahoma. Plaintiff alleges National, as principal, and Westchester Fire Insurance Company ("Westchester"), as surety, made and executed a Miller Act payment bond covering the construction

contract.

Plaintiff's Complaint asserts a claim under the Miller Act (40 U.S.C. §270) against National and its surety, Westchester, which alleges that National has failed to pay Brazeal Masonry, Inc., a subcontractor, for labor and material provided in connection with the renovation of the Marshall's office. Westchester subsequently filed a Crossclaim and Third Party Complaint alleging National and the Daigles had executed an indemnity agreement in which they agreed to indemnify and hold Westchester harmless against any liability which it might incur as a consequence of having executed payment bonds on behalf of National.

The Daigles now move the Court to either dismiss the action against them for improper venue or transfer venue to the United States District Court of Massachusetts. The Miller Act provides in pertinent part:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, ..."

40 U.S.C. §270(b). In this instance, the contract between the United States and National was to renovate the U.S. Marshal's office in Tulsa, Oklahoma, in the Northern District of Oklahoma. Thus, the Miller Act fixes venue in this district, "and not elsewhere." The Court concludes venue is proper with respect to Plaintiff's claim and that Westchester's third party indemnity claim is likewise properly brought as a part of this action. See

Fed.R.Civ.P. 14 and Limerick v. T.F. Scholes, Inc., 292 F.2d 195 (10th Cir. 1961). For this reason, the Daigle's Motion to Dismiss Pursuant to Rule 12(b)(3) (Docket #7) and the Motion For Change of Venue (Docket #8) are both hereby DENIED.

IT IS SO ORDERED THIS 9th DAY OF MARCH, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL L. EBEL,

Plaintiff,

vs.

DEWEY JOHNSON, Sheriff of Rogers County, Oklahoma, in his official and individual capacities, JIMMIE L. HICKS, Undersheriff of Rogers County, Oklahoma, in his official and individual capacities, DEPUTY/JAILER A for Rogers County, Oklahoma, in his/her official capacity, and DEPUTY/JAILER B for Rogers County, Oklahoma, in his/her official capacity,

Defendants.

Case No. 93-C-1036-B

O R D E R

Before the Court for decision is Defendant's Motion to Dismiss (Docket # 5) for the failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This civil rights action arose from alleged severe leg burns sustained by Plaintiff, Michael L. Ebel ("Ebel"), while being held at the Rogers County Jail ("the Jail") on a charge of driving while intoxicated.

The following facts are not in dispute.

1) At approximately 3:00 a.m. on March 27, 1993, the Plaintiff, Michael L. Ebel, was arrested and detained in the Rogers County Jail on a charge of driving while intoxicated. (Plaintiff's Complaint and Defendant's Answer, both on p. 2, para. 8).

2) From midnight to 4:00 p.m. on March 27, 1993, the number of persons in the Jail exceeded the maximum number of persons for which the Jail was certified. (Plaintiff's Complaint and Defendant's Answer, both on p. 2, para. 10).

3) At all times while Plaintiff was in the Jail, the cell doors throughout the Jail were open, and incarcerated persons freely mingled with and had access to each other. (Plaintiff's Complaint, p. 3, para. 12; and Defendant's Answer, p. 2, para. 12).

4) On the night of Plaintiff's arrest, Gene Alberty ("Alberty") and Chad Chaney ("Chaney") were also being held in the Jail, but they were convicted felons awaiting transfer to the State of Oklahoma's correctional institution. (Plaintiff's Complaint and Defendant's Answer, both on p. 3, paras. 18-21).

The remainder of the Plaintiff's allegations are in dispute but are accepted as true for purposes of ruling on Defendants' motion to dismiss. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970).

In his Complaint, Plaintiff claims that each bunk in each cell was occupied and that persons were sleeping on the floor in the cells, day room, and even in the hallways of the Jail. Plaintiff explains that he immediately went to sleep on the floor in the hallway. Prior to his arrest, Plaintiff alleges that Alberty and Chaney had harassed other intoxicated detainees in the Jail and that all of the Defendants, including Sheriff Johnson, had knowledge of this prior harassment. Upon information and belief, Plaintiff alleges that, while he was asleep, Alberty and Chaney placed toilet paper up the legs of his pants and set it on fire.

Plaintiff explains that he was not awakened by the severe burning of his legs due to his high level of intoxication. As a result, Plaintiff claims that his nylon socks melted into his skin and the legs of his jail uniform burned off. Plaintiff asserts that 1)jail personnel did not discover his badly burned condition until breakfast was served; 2)when he asked to be taken to the hospital, Plaintiff was told to "eat your oatmeal"; and 3)after two hours of waiting, Plaintiff was not taken to a nearby hospital but instead, was shuttled fifteen miles away to a physician who merely dressed Plaintiff's wounds. Plaintiff asserts that it was Undersheriff Hicks who made the decision to withhold Plaintiff's treatment for two hours before taking him to a physician rather than a hospital, and Plaintiff further alleges that Hicks spoke to a deputy about fabricating a story that Plaintiff fell asleep while smoking a cigarette.

After his release from jail, Plaintiff was hospitalized, and skin grafts were performed. He alleges he incurred approximately $25,000 in medical bills and that upon requesting reimbursement, Defendants refused to pay for Plaintiff's medical treatment. Plaintiff further claims that he 1)temporarily lost the ability to walk; 2)endured intense and long-lasting pain; and 3)has suffered a partial loss of his ability to earn a living. Plaintiff seeks actual damages in excess of $500,000 and $80,000 in punitive damages from both Sheriff Johnson and Undersheriff Hicks separately.

Now before this Court is a Motion to Dismiss, (Docket # 5),

filed by Defendants on December 28, 1993. To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957) and Matzker v. Herr, 748 F.2d 1142, 1146 (7th Cir. 1984) (citing Hughes v. Rowe, 449 U.S. 5, 10 (1980)). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

Plaintiff Ebel bases his claim against Defendants on 42 U.S.C. § 1983, which states that

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . .".

In short, § 1983 permits recovery in a civil action against any person 1)who acts under color of state law; and 2)where those actions deprive a plaintiff of a constitutional right.[1]

Defendants argue that Plaintiff's action must be dismissed for failure to state a claim upon which relief can be granted under

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[1] Wise v. Bravo, 666 F.2d 1328, 1331 (10th Cir. 1981) and Matzker v. Herr, 748 F. 2d 1142, 1147 (7th Cir. 1984).

Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiff's Complaint 1)contains only conclusory allegations of Constitutional violations pursuant to 42 U.S.C. § 1983; 2)fails to state a violation of clearly established Constitutional or Federal law, which is necessary to overcome a qualified immunity defense; 3)fails to state any grounds that would hold Defendants liable in their official capacities; and 4)fails to specifically plead facts suggesting a meeting of the mind or other overt acts that would be sufficient for a claim of conspiracy.

First, Defendant is correct in contending that an action under 42 U.S.C. § 1983 requires something more than conclusory allegations. In fact, as Defendant correctly quotes, "to state a Constitutional claim, plaintiff must do more than simply state a conclusion or engage in artful pleading. . . A plaintiff must state a compensable claim for relief that details the facts forming the basis of a claim." Blender, Robinson and Co. v. USSEC, 748 F.2d 1415, 1419 (10th Cir. 1984), and "Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

However, contrary to Defendants' assertions[2], Plaintiff's Complaint has sufficiently identified and factually detailed the

[2] Defendants assert that Plaintiff's complaint only made bald allegations of the Sheriff Department's wilful, intentional, and gross disregard for Plaintiff's rights. To the contrary, not only did Plaintiff provide detailed factual allegations in his Complaint (See Order discussing Plaintiff's Allegations, pp. 2-3), but also, in response to a motion to dismiss, Plaintiff is not required to supply this Court with evidence showing the truth of these allegations. However, sufficient evidentiary proof will be required in response to any subsequent motion for summary judgment.

violation of his constitutional rights. Specifically, Plaintiff Ebel claims that Defendants violated his:

1) 4th Amendment right to receive objectively reasonable treatment -- Until a post-arrest detainee is brought before a judicial officer, his treatment is governed by the "objective reasonableness" standard, which asks "whether the defendants' actions were 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to underlying intent or motivation."[3];

2) 8th Amendment right to freedom from deliberately indifferent treatment -- Under the 8th Amendment prohibition of cruel and unusual punishment, an action claiming inadequate medical attention must be judged against the "Deliberate Indifference" Test which asks 1)"whether there is evidence of 'serious medical needs'"; and 2)whether "a government official's 'deliberate indifference' is exhibited toward such needs".[4]; and

3) 14th Amendment right to due process -- The Due Process Clause of the Fourteenth Amendment prohibits the "punishment" of persons unless they have been convicted of a crime. "Of course, the protection of pre-trial detainees from 'punishment' under the Due Process Clause of the Fourteenth Amendment also protects them

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[3] Frohmader v. Wayne, 958 F.2d 1024, 1026 (10th Cir. 1992) (citing Graham v. Connor, 490 U.S. 386, 397 (1989)). Although, it should be noted that this standard is generally used in excessive force claims against the police. But see infra note 13.

[4] Frohmader, 958 F.2d at 1028 (citing Estelle v. Gamble, 429 U.S. 97 (1976) and Gaudreault v. Municipality of Salem, 923 F.2d 203, 208-09 (1st Cir. 1990)).

from the 'cruel and unusual punishments' proscribed by the Eight Amendment . . ."[5]. Logically, the Due Process Clause makes the 8th Amendment applicable to pre-trial detainees.

Plaintiff argues that he did not receive objectively reasonable treatment and indeed, was treated with deliberate indifference because, as he alleges:

1) The Jail was overcrowded, and he had to sleep on the floor. (See Plaintiff's Complaint, pp.2-3, para.'s 10, 13-17). "While overcrowding may not be an Eighth Amendment violation per se its impact upon the jail may result in the denial of 'adequate food, clothing, shelter, sanitation, medical care, and personal safety'".[6] Simply put, overcrowding can act as a precipitator for other more serious violations to the Constitutional right to freedom from deliberately indifferent treatment.

2) Jail officials allegedly had prior knowledge that Alberty and Chaney had harassed other intoxicated detainees. (See Plaintiff's Complaint, p. 4, para.'s 24-5). Prison officials have a duty to protect, and in order to uphold this duty, they must take reasonable steps to prevent violent assaults on inmates and pre-trial detainees.[7] In fact, violation of this duty is determined by the existence of a pervasive risk of harm to inmates from other prisoners and a failure by prison officials to respond reasonably

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[5] Martino v. Carey, 563 F. Supp. 984, 994 (D.Or. 1983) (citing Bell v. Wolfish, 441 U.S. 520 (1979)).

[6] Martino, 563 F.Supp. at 1002.

[7] Id. at 996-7 and Matzker, 748 F.2d at 1149.

to that risk.[8] Plaintiff's Complaint sufficiently stated a risk of harm when it alleged that Jail Officials had prior knowledge of inmate harassment.

3) Plaintiff was not segregated from convicted felons[9] (See Plaintiff's Complaint, p. 3, para.'s 18-21), nor was he protected and segregated due to his infirm (intoxicated) condition.[10] (See Plaintiff's Complaint, pp. 2, 4, para.'s 9, 23, 25). First, Plaintiff's Complaint sufficiently stated these facts to support the failure of prison officials to respond reasonably to the above-mentioned risk. Furthermore, it has been held that "lack of segregation or classification of dangerous inmates, leading to victimization, beatings and rapes of less violent inmates, could constitute constitutional violation per se, without reference to other conditions of confinement."[11]

4)After allegedly being badly burned by Alberty and Chaney, (See Plaintiff's Complaint, pp. 3-4, para.'s 18-23), Jail Officials allegedly told Plaintiff to "eat his oatmeal" when he requested medical attention and did not provide him any treatment for more than two hours, and then, he was not taken to a hospital but rather to a doctor who dressed his wounds. (See Plaintiff's Complaint, p.

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[8] Matzker, 748 F.2d at 1149.

[9] Segregation of convicted felons required under Okla. Stat. tit. 57, § 57 (1991).

[10] Segregation of infirm prisoners required under Okla. Stat. tit. 57,§ 47 (1991) and Okla. Stat. tit. 74, § 192 A (8) (1987).

[11] Martino, 563 F.Supp. at 997 (citing Wright v. Rushen, 642 F.2d 1129, 1134 n.3 (9th Cir. 1981)).

4, para.'s 27-9). Clearly, Plaintiff is claiming inadequate medical treatment as well as failure to provide prompt medical attention, which, if true, deprived Plaintiff of his constitutional rights of due process[12], objectively reasonable treatment[13], and freedom from deliberately indifferent treatment.[14]

5)Defendants have allegedly refused to pay Plaintiff's hospital bills incurred as a result of injuries (burns) that occurred in the Jail. (See Plaintiff's Complaint, pp. 5-6, para.'s 30, 41).

To summarize, Plaintiff has specifically identified and plead facts sufficient to establish a prima facie violation of his Constitutional rights to receive due process, objectively reasonable treatment, and the freedom from deliberately indifferent treatment. It is precisely this conclusion that dictates the failure of Defendants' second argument as well. Defendants argue

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[12] "Accordingly, a pretrial detainee's due process right to be free from punishment is violated when a jailer fails to promptly and reasonably procure competent medical aid for a pretrial detainee who suffers a serious illness or injury while confined." Matzker, 748 F.2d at 1147 (referring to Bell v. Wolfish, 441 U.S. 520, 526 (1979).

[13] As Plaintiff asserts in his Response to Defendants' Motion to Dismiss, "at least one case specifically holds failure to provide an unarraigned arrestee with adequate medical attention constitutes objectively unreasonable treatment violative of the Fourth Amendment to the Constitution of the United States of America". See Plaintiff's Response to Defendants' Motion to Dismiss (Docket #7), pp. 3-4 and Freece v. Young, 756 F. Supp. 699 (W.D.N.Y. 1991).

[14] Deliberately indifferent denial or delay of adequate medical attention violates the Eighth Amendment. Matzker, 748 F.2d at 1147 and Martin v. Board of County Commissioners, 909 F.2d 402, 406 (10th Cir. 1990).

that Plaintiff's Complaint fails to state a claim for which relief can be granted because it does not state a violation of clearly established Constitutional or Federal law with the particularity required in qualified immunity cases. In many cases, the 10th Circuit has held that once the defendant raises the qualified immunity defense, the burden rests with the Plaintiff to come forward with facts or allegations to show the violation of a clearly established law or constitutional right.[15] However, the above Constitutional and factual analysis clearly shows that Plaintiff has plead specific facts sufficient to state violations of his 4th Amendment right to receive objectively treatment, 8th Amendment right to freedom from deliberately indifferent treatment, and 14th Amendment right to due process.

Despite Defendants' third contention that Plaintiff only states grounds to hold Defendants individually liable, Plaintiff's complaint alleges that Defendants, (Johnson, Hicks, and Jailers A and B), acted under color of state law (i.e. in their official capacities) as required in 42 U.S.C. § 1983. Plaintiff first claimed that he was arrested and detained at the Rogers County Jail on a charge of driving while intoxicated. Then, Plaintiff charged that Defendants, in their official and individual capacities, violated the laws of the State of Oklahoma. Specifically, Plaintiff alleged that:

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[15] Butler v. City of Norman, 992 F.2d 1053, 1054 (10th Cir. 1993) and Frohmader, 958 F.2d at 1027 (citing Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) and Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990)).

1) Defendants failed to meet the standards promulgated by the State Department of Health in Okla. Stat. tit. 74, § 192 (1987)[16] and for which the Sheriff is required to conform in Okla. Stat. tit. 57, § 47 (1991). (See Plaintiff's Complaint, pp. 5-10, para.'s 38, 42-55, and 66).

2) Plaintiff's detainment in the general jail population violated Okla. Stat. tit. 57, § 57 (1991), which provides that all jails shall provide sufficient and convenient apartments for confining prisoners not criminal, separate from felons and other criminals.[17]

Additionally, Plaintiff asserted and Defendants admit (Defendant's Answer, p. 5, para. 39) that Sheriff Johnson is liable for the actions of Undersheriff Hicks[18] and of Deputy/Jailers A and B.[19] This Court concludes that these allegations are sufficient to hold Defendants liable in their individual and official capacities.

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[16] Specific allegations include:
1) Overcrowding violation of living area requirements in Okla. Stat. tit. 74, § 192 A (5) (1987));
2) Failure to provide adequate medical care as required in Okla. Stat. tit. 74, § 192 A (9) (1987)); and
3) Failure to take proper steps to ensure the segregation of infirm (intoxicated) prisoners as required in Okla. Stat. tit. 74, § 192 A (8) (1987)).

[17] See text, p. 2, paragraphs 1 and 2 (delineating undisputed facts of failure to segregate and overcrowding).

[18] "The sheriff shall be responsible for the official acts of his undersheriff. . ." Okla. Stat. tit. 19, § 547 (1988).

[19] ". . . The sheriff shall in all cases be liable for the negligence and misconduct of the jailer . . ." Okla. Stat. tit. 57, § 54 (1991). "The sheriff . . . shall keep such jail himself, or by his deputy or jailer, for whose acts he and his sureties shall be liable." Okla. Stat. tit. 19, § 513 (1988).

Finally, Defendants contend in their fourth and last argument that Plaintiff fails to specifically plead facts suggesting a meeting of the mind or other overt acts that would be sufficient for a claim of conspiracy. Defendants cite the rule that "mere allegations of conspiracy, backed up by no factual showing of participation in a conspiracy, are insufficient to support such an action. . .".[20] Indeed, conclusory allegations of conspiracy without supporting factual averments are insufficient to state a claim for relief.[21] In order to sustain a civil rights conspiracy claim, plaintiff must provide "specific facts showing agreement and concerted action".[22]

In the instant case, Plaintiff merely alleges that "Undersheriff Hicks 'spoke' to a deputy about fabricating a story that Plaintiff fell asleep while smoking a cigarette". (See Plaintiff's complaint, p. 11, para. 70). Plaintiff, however, does not allege a meeting of the minds or any agreement to fabricate this story, which is a requirement to pleading conspiracy. Therefore, the Court concludes that Plaintiff has not alleged conspiracy with sufficient specificity.

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[20] See Defendants' Brief in Support of Defendants' Motion to Dismiss, p.2, para. 3; Buschi v. Kirben, 775 F.2d 1240, 1248 (4th Cir. 1985).

[21] Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983).

[22] Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989). A plaintiff's general assertion of conspiracy is not actionable. Jafree v. Barber, 689 F.2d 640, 643 (7th Cii. 1982) and Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206-07 (7th Cir. 1980).

For the reasons stated herein, the Court concludes that the Defendants' Motion to Dismiss (Docket #5) for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be and is hereby PARTIALLY GRANTED as to the conspiracy claim, and the remainder of Defendants' Motion should be and is hereby DENIED. The conspiracy claim is hereby DISMISSED.

IT IS SO ORDERED THIS 7th DAY OF March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALIN ORR,

Plaintiff,

vs.

LARRY FIELDS, et al

Defendants.

No. 93-C-1003-E

ORDER

Before the Court is Defendant's motion to dismiss filed on January 19, 1994. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #4] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 8th day of March, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RENALDO WASHINGTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-1028-E
	)	
JACK COWLEY,	)	
	)	
Respondent.	)	

ORDER

At issue before the court in this habeas corpus action are respondent's motion to dismiss for failure to exhaust state remedies, petitioner's response and motion for default judgment.

Respondent has moved to dismiss petitioner's application for a writ of habeas corpus as a mixed petition. Respondent argues that the petitioner has not presented to the Oklahoma Court of Criminal Appeals two of his grounds for relief: (1) that his due process rights were violated when the trial was passed twenty-eight times; and (2) that his due process rights were violated because there were no blacks allowed on the jury. The petitioner argues that his first two grounds for relief "are not new grounds but rather an extension of proposition 1 of his Direct Appeal": that improper conduct by the State interfered with the testimony of Charlotte Liggins.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in

//

> 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

After carefully reviewing the record, the court concludes that the petitioner has not exhausted his state remedies as to his first two grounds for relief. Although the petitioner raised due process in his direct criminal appeal, he did so only on the basis of improper conduct by the State in destroying the testimony of witness Liggins. Accordingly, petitioner's application for a writ of habeas corpus is subject to dismissal as a mixed petition. See id.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Respondent's motion to dismiss [docket #7] is **granted.**

(2) The petition for a writ of habeas corpus is **dismissed.**

(3) The Attorney General is **dismissed** as a party in this case. See Rule 2(a) of the Rules Governing Section 2254 cases.

(4) Petitioner's motion for a default judgment [docket #9] is **denied.**

SO ORDERED THIS 8th day of March, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

O'DELL LAWRENCE BROWN,)
)
Petitioner,)
)
vs.) No. 94-C-0005-E
)
MICHAEL CODY,)
)
Respondent.)

ORDER

Before the court is respondent's motion to dismiss for failure to exhaust state remedies. Respondent asserts that the petitioner has not pursued a direct appeal of his conviction and has failed to timely appeal the denial of his application for post-conviction relief. The petitioner has not responded.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the petitioner

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has not exhausted all the various grounds for relief he has alleged. In addition, the court notes that the petitioner has not objected to respondent's motion to dismiss. This constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, respondents' motion to dismiss (docket #4) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed.**

IT IS SO ORDERED this 8th day of March, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DENNIS LEE ROBINSON,)
)
Petitioner,)
)
vs.) No. 93-C-316-B
)
RON CHAMPION,)
)
Respondent.)

ORDER

This matter came on for hearing on October 7, 1993, before the Honorable Thomas R. Brett. The petitioner appeared pro se, and the respondent was represented by counsel of record, the Attorney General of the State of Oklahoma.

In April 1993, petitioner filed this habeas corpus action alleging inordinate delay on the part of OIDS contract counsel in filing his appellate brief, and on the part of the Oklahoma Court of Criminal Appeals in rendering a decision. This action was not consolidated with Harris v. Champion because the petitioner did not file his application prior to April 1, 1993. The Oklahoma Court of Criminal Appeals affirmed petitioner's conviction on March 2, 1994. See docket #13.

After carefully considering the pleadings, the testimony, the evidence, and the arguments presented by petitioner and counsel for the respondent, the court concludes that the petitioner is not entitled to relief on his claim of inordinate delay. Even if there had been inordinate delay in the disposition of petitioner's direct appeal, habeas corpus relief based solely on previous inordinate

appellate delay is unavailable where the state appellate court has rendered a decision affirming the conviction. See Harris v. Champion, ___ F.3d ___, Nos. 93-5123 & 93-5209, slip op. at 50, 54-55 (10th Cir. Jan. 26, 1994). "Only when appellate delay 'prejudiced [the petitioner's] due process rights so as to make his confinement constitutionally deficient,' would habeas relief based on appellate delay be appropriate for a petitioner whose conviction has been affirmed." Harris, slip op. at 55. The petitioner has failed to make such a showing in this case.

ACCORDINGLY, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is **denied.**

SO ORDERED THIS 7 day of Mar., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LONNIE MILLER,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-684-B

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment filed on January 10, 1994. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #4] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 7th day of Mar., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESSE WATSON,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA,

Defendants.

No. 93-C-831-B

ORDER

Before the Court is Defendant's motion to dismiss filed on January 31, 1994. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #5] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 7th day of March, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	Case No. 93-C-1083-B
CHARLES N. HOLD, an individual, and ALWIDA M. HOLD, an individual,	)	
Defendants.	)	

AGREED JUDGMENT

Pursuant to the terms of the settlement agreement between the parties, this Judgment is hereby entered in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc., against the Defendants, Charles N. Hold and Alwida M. Hold, jointly and severally, in the amount of $55,000.00, plus any interest allowable by law.

Dated this 7th day of Mar., 1994.

/ THOMAS R. BRETT

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

APPROVED:

Laura L. Gonsalves
LAURA L. GONSALVES
Attorney for the Plaintiff

Patrick D. O'Connor
PATRICK D. O'CONNOR
Attorney for the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

v.

TULSA REGIONAL MEDICAL CENTER, DON HUDSON, PRESTON STANLEY, BILL JORDAN, and TOM L. TEEL,

Defendants.

CASE NO. 92-C-652-B

O R D E R

This matter comes on for consideration of Plaintiff's Objection To Report and Recommendation of Magistrate Judge (docket entry #50) which relates to Defendants Jordan and Teel's Motion For Summary Judgment (docket entry #40).

This is an excessive force/civil rights action brought pro se by Plaintiff Thomas R. Sligar (Sligar) who alleges that a violation of 42 U.S.C. §1983 and various constitutional amendments occurred on July 29, 1990, when Collinsville police officers Tom Teel (Teel) and Bill Jordan (Jordan), during a traffic stop and after discovering Sligar had outstanding warrants against him, arrested Sligar and allegedly beat him several times.

Sligar claims Jordan hit him in the stomach when Sligar was being placed in the officer's car after arrest. Sligar claims that later, at the Collinsville police station, he was beaten with a baton which was also stuck down Sligar's pants. Sligar claims that after being taken to the Tulsa County jail Jordan slung him into the wall, injuring Sligar. Before Sligar was taken to the Tulsa

County jail he was taken, at his request, to Tulsa Regional Medical Center[1] where it was determined he did not have life threatening injuries and he was thereby returned to jail.

Defendants essentially deny Sligar's allegations other than to admit the officers had to use some force in restraining Sligar who attacked and assaulted the officers.

Sligar was convicted, in state court, of assault and battery upon the police officers.

In this Court's order of Oct. 23, 1993, denying Sligar's Motion to Dismiss as to officers Jordan and Teel but granting the same as to officers Hudson and Stanley, the Court directed that any motions for summary judgment address the issue of collateral estoppel by reason of the conviction for assault and battery. The matter was then referred to the Magistrate Judge for Report and Recommendation.

On Feb. 16, 1994 the Magistrate Judge entered a Report and Recommendation concluding that collateral estoppel does not preclude Sligar's §1983 action based on excessive force in violation of his constitutional rights. Further, the Report recommended that summary judgment be granted in favor of Jordan and Teel because "a jury could still not reasonably find that the Defendants engaged in excessive force." The Report noted "[O]f particular importance is the scant "evidence" that Sligar submitted in opposition to the Motion for Summary Judgment. In his Response

[1] The Court granted summary judgment in favor of Tulsa Regional Medical Center by Order dated Feb. 24, 1993

he, in effect, simply states that he was "severely beaten all over"."

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

The Court, after reviewing the pleadings and the record, particularly the sworn statements of Plaintiff Sligar, concludes a genuine issue of disputed fact exists concerning the amount of force used, and necessity for force, incident to Sligar's arrest, booking and incarceration. The Court further concludes the Report and Recommendation of the Magistrate Judge should be adopted in part and rejected in part. The Court affirms the Magistrate Judge's conclusion that Plaintiff Sligar is not collaterally estopped by his state court conviction of assault and battery of the officers. The Court, however, concludes that the Report's recommendation that summary judgment be Granted in favor of Defendants Jordan and Teel should not be affirmed. Accordingly, the Court denies Defendants' Motion for Summary Judgment (docket entry #40) and sustains in part Plaintiff's Objection To Magistrate's Report and Recommendation (docket entry #50).

Defendants are directed to prepare an Agreed Pre-Trial Order and submit same, within ten days from the date hereof, to Plaintiff for review and signature. Plaintiff is to forward the Agreed Pre-Trial Order, or his objections thereto, to the Clerk for filing on

or before twenty-five days from the date hereof. Jury Trial herein is scheduled for April 18, 1994, at 9:30 a.m..

IT IS SO ORDERED, this 7th day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN EARL AMES,)
)
Plaintiff,)
)
vs.) No. 93-C-438-B
)
JIM EARP, et al.,)
)
Defendants.)

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Melvin E. Ames. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 3rd day of March, 1994.

THOMAS R. BRETT, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONDA FLYNN,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF OTTAWA COUNTY, OKLAHOMA; STATE OF OKLAHOMA; AND CITY OF MIAMI, OKLAHOMA,

Defendants.

Case No. 93-C-1139-B

O R D E R

Now before the Court for its consideration is Defendant, State of Oklahoma's Motion to Dismiss Plaintiff's State Law Tort Claim (Docket # 6) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff brings a Title VII[1] case alleging that during 1992, she was employed by Defendant in the Ottawa County multi-jurisdictional task force; and while working with the task force, Plaintiff alleges that she was sexually harassed by her immediate supervisor, as well as various other employees also employed by the State. Plaintiff further alleges that "[t]he termination of Plaintiff's employment with the Defendant[] was a result of the sexual harassment." Plaintiff's Complaint, filed Dec. 23, 1993, para. VI, p.2.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that

[1] Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. **Conley v. Gibson**, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well pleaded facts. **Jones v. Hopper**, 410 F.2d 1323 (10th Cir. 1969). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. **Olpin v. Ideal National Ins. Co.**, 419 F.2d 1250 (10th Cir. 1969).

Defendant maintains that Plaintiff's state law tort cause of action cannot be maintained in Federal Court because the Eleventh Amendment to the United States Constitution bars any such claim. The State of Oklahoma has waived its sovereign immunity from liability of the torts of its employees only as set forth in The Governmental Tort Claims Act. **Okla.Stat.** tit. 51, §§ 151, et seq. (1992 & Supp. 1994). However, the Act clearly states that the state reserves its Eleventh Amendment immunity. **Okla.Stat.** tit. 51, § 152.1 B. (1992). Moreover, it has been consistently held that a sovereign's immunity under the Eleventh Amendment may be waived, but the state's consent to suit against it in Federal Court must be unequivocally expressed. **See Pennhurst State Sch. & Hosp. v. Halderman**, 465 U.S. 89, 99 (1984). This rule is equally applicable to pendent claims as well. **Id.** at 120. Here, there is no evidence of any unequivocal state consent, and Plaintiff concedes this point. Therefore, Plaintiff's state law tort claim is dismissed.

Defendant also contends that Plaintiff's claim for punitive damages is barred by the terms of the Civil Rights Act of 1991.

Title 42 U.S.C. § 1981a(b)(1) specifically states:

> "A Complaining party may recover punitive damages under this section against a respondent (**other that a government, government agency or political subdivision**) ... " (emphasis added).

The terms of the statute could not be more clear. Accordingly, Plaintiff's claims for punitive damages are dismissed.

For the reasons set forth above, Defendant State of Oklahoma's Motion to Dismiss Plaintiff's state law tort cause of action and claim for punitive damages is GRANTED.

IT IS SO ORDERED THIS 3rd DAY OF March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HELEN ISRAEL, Plaintiff, vs. AVIS RENT-A-CAR SYSTEM, INC., Defendant and Third-Party Plaintiff, vs. MID-CONTINENT CASUALTY COMPANY, Intervenor.	)	No. 92-C-446-B

J U D G M E N T

In keeping with the verdict of the jury returned this date, Judgment is hereby entered in favor of the Plaintiff, Helen Israel, and against the Defendant, Avis Rent-a-Car System, Inc., in the sum of $1,900,000.00, with pre-judgment interest thereon at the rate of 9.58% per annum from May 31, 1992 to December 31, 1992, from January 1, 1993 to December 31, 1993, at the rate of 7.42% per annum, and from January 1, 1994 to March 3, 1994, at the rate of 6.99% per annum; Helen Israel is further awarded judgment for exemplary damages in the sum of $250,000.00; and interest at the rate of 3.74% per annum on said compensatory and exemplary damage sums from the date hereon.

The Intervenor, Mid-Continent Casualty Company, is hereby awarded the sum of $168,275.43 from the Plaintiff's award herein, as and for its subrogation claim acknowledged by the parties herein. Further, as the prevailing party, the Plaintiff is awarded

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costs against the Defendant if timely applied for pursuant to Local Rule 54.1, and the parties are to pay their own respective attorney fees.

DATED this 31st day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCUS R. MILLER,

Petitioner,

vs.

EDWARD EVANS,

Respondent.

No. 92-C-801-B

ORDER

At issue before the court in this habeas corpus action are respondent's motion to dismiss for failure to exhaust state remedies, and petitioner's factual information sheet.

In July 1992, petitioner filed this habeas corpus action alleging inordinate delay on the part of the Tulsa County Public Defender in filing his appellate briefs in Case Nos. CRF-89-4303, CRF-89-4506, and CRF-89-5423, and on the part of the Oklahoma Court of Criminal Appeals in rendering a decision. This action was not consolidated with Harris v. Champion because the petitioner was not represented by the Oklahoma Indigent Defense System.

On November 24, 1992, the Oklahoma Court of Criminal Appeals reversed and remanded for a new trial petitioner's direct appeal in Case No. CRF-89-4303. See Respondent's motion to dismiss (docket #12) ex. C. Petitioner's direct appeals in Case Nos. CRF-89-4506 and CRF-89-5423 were affirmed on November 2 and September 28, 1993, respectively. See Respondent's response (docket #18) and motion to dismiss ex. H (docket #12).

After carefully considering the record, the court concludes

that the petitioner is not entitled to relief on his claim of inordinate delay. Even if there had been inordinate delay in the disposition of petitioner's direct appeals, habeas corpus relief based solely on previous inordinate appellate delay is unavailable where the state appellate court has rendered a decision affirming the conviction or has reversed the conviction with prejudice to retrial. See Harris v. Champion, ___ F.3d ___, Nos. 93-5123 & 93-5209, slip op. at 50, 54-55 (10th Cir. Jan. 26, 1994). Petitioner's contention that the reversal of his conviction in Case No. CRF-89-4303 prejudiced his appeals in Case Nos. CRF-89-4506 and CRF-89-5423 (where his sentences were enhanced on the basis of the first conviction) lacks any merit. (Objection to respondent's factual information sheet, docket #19.) "Only when appellate delay 'prejudiced [the petitioner's] due process rights so as to make his confinement constitutionally deficient,' would habeas relief based on appellate delay be appropriate for a petitioner whose conviction has been affirmed." Harris, slip op. at 55.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The petition for a writ of habeas corpus is **denied**; and

(2) Respondent's motion to dismiss for failure to exhaust state remedies [docket #11] is **denied as moot.**

SO ORDERED THIS 3rd day of May, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SHEREE POWELL HENDERSON,

Plaintiff,

v.

STATE OF OKLAHOMA, EX REL., THE BOARD OF REVIEW FOR THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, and the UNITED STATES OF AMERICA EX REL. UNITED STATES DEPARTMENT OF LABOR,

Defendants.

CIVIL ACTION NUMBER 94 C 89 B
Tulsa County District Court
Case No. CJ-93-05173

STIPULATION OF DISMISSAL AS TO THE UNITED STATES OF AMERICA, EX REL UNITED STATES DEPARTMENT OF LABOR

COMES NOW the Plaintiff and hereby dismisses without prejudice her action against the Unites States of America, Ex Rel. Unites States Department of Labor.

Authority: Rule 41 of Federal Rules of Civil Procedure

ROBERT H. TIPS, OBA # 9029
509 Philtower Building
427 South Boston
Tulsa, OK 74103-4110
(918) 585-1181

United States Attorney,
Northern District of the State of Oklahoma
Stephen C. Lewis

by: Phil Pinnell
Assistant United States Attorney
3600 U. S. Courthouse
Tulsa, OK 74130

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 4 day of ~~February~~ March, 1994, I mailed a true and correct copy of the above and foregoing Motion to Remand Case to State Court with sufficient prepaid postage affixed thereon to the following:

Phil Pinnell
Assistant United Stats Attorney
3600 U. S. Courthouse
Tulsa, OK 74130

Gary E. Bernstecker
U. S. Department of Labor
Office of the Solicitor
Suite N 2101
200 Constitution Ave.
Washington, D. C. 20210

State of Oklahoma
Ex Rel the Board of Review for the
Oklahoma Security Commission
Charles T. Henry, Chairman
P. O. Box 53345
Oklahoma City, OK 73152

Oklahoma Employment Security Commission
Wayne Win, Executive Director
Will Rogers Memorial Office Building
Oklahoma City, OK 73105

Robert H. Tips

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CURTIS SCOTT, DEBRA SCOTT,

Plaintiffs,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA, TULSA COUNTY, OKLAHOMA and OKLAHOMA STATE DEPARTMENT OF EDUCATION,

Defendants.

Case No. 93-C-544-B

AGREED JOURNAL ENTRY OF JUDGMENT

On the 4th day of March, 1994, the captioned case came on for non-jury trial before me, the undersigned Judge, all parties having agreed to settle and compromise the lawsuit pursuant to Court approval.

Chris Gentges appeared for the plaintiffs, Curtis Scott and Debra Scott (the "Scotts"), and announced ready for trial. The defendant, Independent School District No. 1 of Tulsa, Tulsa County, Oklahoma (the "Tulsa School District"), appeared by its attorney, Andrea R. Kunkel of Rosenstein, Fist & Ringold, and announced ready for trial.

The Court, having reviewed the file and heard the testimony of the parties, found as follows:

1. This Court has proper jurisdiction and venue of the parties and over the subject matter of this litigation.

2. Debra Scott's date of birth is October 29, 1971. Before her graduation from the Oklahoma School for the Blind, also known as Parkview, Debra was eligible for special education and related services from the Tulsa School District under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq.

3. Curtis Scott placed his daughter Debra at Parkview for the 1977-78 school year. She attended Parkview through her graduation in May, 1991. Debra was never enrolled in the Tulsa School District.

4. During the 1990–91 school year, Curtis Scott requested reimbursement for Debra's transportation expenses to and from Parkview. The School District provided transportation reimbursement for the Scotts' trips to and from Parkview during the 1990–91 school year.

5. On January 9, 1991, Curtis Scott requested a due process hearing against the Tulsa School District seeking reimbursement for transportation expenses he had incurred from the 1977–78 through the 1989–90 school years.

6. On June 14, 1991, an administrative appeal officer ordered the Tulsa School District to reimburse the Scotts for transportation expenses for the 1988–89 and 1989–90 school years. The appeal officer found that the Scotts' request for reimbursement for the 1977–78 through 1987–88 school years was barred by the applicable statute of limitation. On September 19, 1991, the appeal officer held that the amount to be paid by the Tulsa School District for the 1988–89 and 1989–90 school years totaled $3,307.82.

7. The School District tendered payment in the amount of the appeal officer's order to the Scotts in November, 1991. The Scotts refused that payment.

8. On June 14, 1993, the Scotts filed this action seeking review of the appeal officer's June 14, 1991 decision.

9. The parties have agreed to settle all claims, including claims for attorney's fees and costs, that the Scotts now have or may have against the Tulsa School District, for the total sum of $10,000.00, plus interest at the annual rate of 6.99% from the date of entry of judgment.

10. The parties have also agreed that this judgment is final and nonappealable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Curtis Scott and Debra Scott have and recover judgment against the Tulsa School District in the principal sum of $10,000.00, with interest at the annual rate of 6.99% from the date of entry of judgment and that each of the findings of the Court set

forth above shall be and is hereby adopted as the order, judgment and decree of the Court in this action.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

Chris Gentges

Attorney for Plaintiffs, Curtis Scott and Debra Scott

Andrea R. Kunkel

Attorney for Defendant, Independent School District No. 1 of Tulsa, Tulsa County, Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAMS PIPE LINE COMPANY, Plaintiff,	)	
vs.	)	Case No. 92-C-125-B
INSURANCE COMPANY OF NORTH AMERICA, Defendant.	)	

J U D G M E N T

Pursuant to the Jury's Verdict accepted and filed of record on the 2nd day of December, 1993, it is hereby ADJUDGED and DECREED that the Plaintiff, Williams Pipe Line Company recover $5,000,000.00 against the Defendant, Insurance Company of North America, in compensatory damages, and $495,000.00 in attorneys' fees and disbursements plus post-judgment interest on the entire amount of $5,495,000.00 at the rate of 4.22 percent per annum. Costs are assessed against the Defendant and may be awarded upon timely application pursuant to local Rule 54.1.

IT IS SO ORDERED, this 4th day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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Parties Phoned

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE EDWARD PRATER,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 93-C-810-B

ORDER

At issue before the court in this habeas corpus action are petitioner's application, alleging inordinate delay on the part of the Oklahoma Court of Criminal Appeals, and respondent's motion to dismiss. The petitioner has not responded to respondent's motion.

Petitioner's failure to respond to respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C. In any case, habeas corpus relief based solely on previous inordinate appellate delay is unavailable where, as in this case, the state appellate court has rendered a decision affirming petitioner's conviction. See Harris v. Champion, ___ F.3d ___, Nos. 93-5123 & 93-5209, slip op. at 50, 54-55 (10th Cir. Jan. 26, 1994).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The petition for a writ of habeas corpus is **denied**; and

(2) Respondent's motion to dismiss [docket #4] is **denied as**

moot.

SO ORDERED THIS 3rd day of Mar., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-4-94

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ADEAN BRAGGS a/k/a ADEAN HARRIS; JOHN L. HARRIS; ROBERT E. CLIFTON, JR.; YVETTE BRAGGS CLIFTON f/k/a YVETTE BRAGGS; C.I.T. FINANCIAL SERVICES, INC.; AMERICAN GENERAL FINANCE; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 93-C-173-E**

FILED

MAR 13 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day of March, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously claimed no right, title or interest in the subject property; and the Defendants, Adean Braggs a/k/a Adean Harris; John L. Harris; Robert E. Clifton, Jr.; Yvette Braggs Clifton f/k/a Yvette Braggs; American General Finance; and C.I.T. Financial Services, Inc., appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Adean Braggs a/k/a Adean Harris, was served with Summons and Amended Complaint on November 30, 1993; the Defendant, John L. Harris, was served with Summons

and Amended Complaint on November 30, 1993; the Defendant, Robert E. Clifton, Jr., was served with Summons and Amended Complaint on November 30, 1993; the Defendant, Yvette Braggs Clifton f/k/a Yvette Braggs, was served with Summons and Amended Complaint on September 10, 1993; the Defendant, American General Finance, was served with Summons and Amended Complaint on September 8, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Amended Complaint on September 7, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Amended Complaint on September 7, 1993.

The Court further finds that the Defendant, C.I.T. Financial Services, Inc., was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 15, 1993, and continuing to October 20, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, C.I.T. Financial Services, Inc., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a

bonded abstracter filed herein with respect to the last known address of the Defendant, C.I.T. Financial Services, Inc.. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer To Amended Complaint on September 28, 1993; and Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer To Amended Complaint on September 28, 1993; and that the Defendants, Adean Braggs a/k/a Adean Harris; John L. Harris; Robert E. Clifton, Jr.; Yvette Braggs Clifton f/k/a Yvette Braggs; American General Finance; and C.I.T. Financial Services, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 17, 1992, Adean Harris and John L. Harris filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-C-03991-C. On August 2, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The North Sixty (60) feet of Lot Six (6), Block Nine (9), MARTIN ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 16, 1978, the Defendant, Adean Braggs, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, her mortgage note in the amount of $16,100.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Adean Braggs, executed and delivered to the United States of America, acting on

behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated October 16, 1978, covering the above-described property. Said mortgage was recorded on October 17, 1978, in Book 4359, Page 2124, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Adean Braggs, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Adean Braggs, is indebted to the Plaintiff in the principal sum of $11,641.94, plus interest at the rate of 9.5 percent per annum from June 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $299.10 ($36.00 for fees for service of Summons and Complaint and $263.10 fee for publication).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Adean Braggs a/k/a Adean Harris; John L. Harris; Robert E. Clifton, Jr.; Yvette Braggs Clifton f/k/a Yvette Braggs; American General Finance; and C.I.T. Financial Services, Inc., are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant,

Adean Braggs a/k/a Adean Harris, in the principal sum of $11,641.94, plus interest at the rate of 9.5 percent per annum from June 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.74 percent per annum until paid, plus the costs of this action in the amount of $299.10 ($36.00 for fees for service of Summons and Complaint and $263.10 fee for publication), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Adean Braggs a/k/a Adean Harris; John L. Harris; Robert E. Clifton, Jr.; Yvette Braggs Clifton f/k/a Yvette Braggs; American General Finance; C.I.T. Financial Services, Inc.; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Adean Braggs a/k/a Adean Harris, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-173-E
PP/esf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,)
)
Plaintiff,)
)
vs.) No. 93-C-235-E
)
EVA JETTON, et al.,)
)
Defendants.)

ORDER

At issue before the court in this prisoner's civil rights action are defendants' motion to dismiss, plaintiff's motion for summary judgment, and plaintiff's motion to strike defendants' response.

I. BACKGROUND

In March 1993, plaintiff, a state inmate, brought this civil rights action against Eva Jetton, County Clerk of Osage County, and P. Moore, Deputy County Clerk of Osage County. Plaintiff alleged that, although defendants received notice of his claim under the Oklahoma Tort Claims Act by certified mail with return receipt requested, they failed to file his notice in accordance with that Act and instead forwarded it to the District Attorney's Office for receipt. Plaintiff alleged that defendants' action violated his rights to petition the government for redress of grievances under the First and Fourteenth Amendments of the United States Constitution and Article II § 3 of the Oklahoma Constitution, and violated his "state created right" under the Oklahoma Tort Claims Act to have his state tort claim processed in the County Clerk's Office instead of the District Attorney's office. Plaintiff sought

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equitable relief and compensatory and punitive damages.

Defendants moved to dismiss plaintiff's action for failure to state a claim. Plaintiff objected to defendants' motion and moved for summary judgment in his favor. The defendants responded to plaintiff's motion for summary judgment relying on the same arguments as in their motion to dismiss. Plaintiff then moved to strike defendants' response as duplicative of their motion to dismiss.

II. DISCUSSION

Because the plaintiff pursues his claim pro se, the court construes his complaint liberally. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). A complaint should not be dismissed unless, accepting plaintiff's allegations as true, it appears beyond doubt that plaintiff can prove no set of facts to support his claim for relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The Oklahoma Tort Claims Act narrowly structures the method for bringing a tort claim against a political subdivision such as a county. Okla. Stat. Ann. tit. 51, § 152(8) (West Supp. 1994). The Act requires that the plaintiff give notice within one year of the date the loss occurs, and commence an action within one hundred eighty days after denial of the claim. Okla. Stat. Ann. tit. 51, §§ 156(B) and 157(B) (West Supp. 1994). Section 156(D) designates the office of the County Clerk as the proper place for filing the notice of a claim against Osage County. "A claim is deemed denied if the . . . political subdivision fails to approve the claim in its entirety within ninety days." Section 157(A).

After construing all of plaintiff's allegations in his favor, the court concludes that the plaintiff cannot prove any set of facts in support of his claim which would entitled him to relief. While it is undisputed that the plaintiff has a constitutional right to petition the government for redress of grievances under the First and Fourteenth Amendments, see Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990), the plaintiff cannot prove that the defendants failed to file his notice of Tort Claims Act in the County Clerk's Office in retaliation for exercising his right to petition the government for redress of grievances. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) (only the deliberate retaliation by state actors against an individual for exercising his right to petition the government for redress of grievances is actionable under section 1983), disagreement recognized on other grounds, Archtec, Inc. v. City of Henderson, 5 F.3d 534 (9th Cir. 1993); Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988) (intentional obstruction of the right to seek redress "is precisely the sort of oppression that . . . section 1983 [is] intended to remedy"). Cf. Smith, 899 F.2d at 947 (prison officials may not retaliate against or harass inmate for exercising his right of access to the courts, even if actions taken against inmate would otherwise be permissible). The plaintiff has not alleged any interference with his ability to commence a suit under the Tort Claims Act within the prescribed time period. Nor has he alleged

that defendants' action rendered his notice inadequate.[1]

The court declines to exercise supplemental jurisdiction over plaintiff's state law claims. See 28 U.S.C. § 1367(c)(3).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's complaint is dismissed for failure to state a claim;

(2) Defendants' motion to dismiss [docket #5] is **granted;**

(3) Plaintiff's motion for summary judgment [docket #7] is **denied;** and

(4) Plaintiff's motion to strike [docket #11] is **denied.**

SO ORDERED THIS 3rd day of March, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

---

[1]Plaintiff's notice was probably deemed filed in the County Clerk's Office under section 156(D) when defendant Moore received it by certified mail return receipt requested. Section 156(C) explicitly provides that "[a] claim [against the State] may be filed by certified mail with return receipt requested," and that "[a] claim which is mailed shall be considered filed upon receipt by the Office of the Risk management Administrator." Neither party has argued, nor has the court found any authority, that this rule should not be applicable to a governmental subdivision of the State, such as a county.

Additionally, the involvement of the District Attorney's Office of Osage County may have been necessary for investigation purposes. Section 156(C) provides that upon filing a claim against the State, the Office of the Risk Management Administrator "shall immediately notify the Attorney General and the agency concerned and conduct a diligent investigation of the validity of the claim within the time specified for approval or denial of claims by section 157 of this Title." The Oklahoma Supreme Court has recognized that the notice requirement furthers legitimate interests "by promoting prompt investigation; by providing the opportunity to repair any dangerous condition and for speedy and amicable settlement of meritorious claims; and to allow the opportunity to prepare to meet possible fiscal liabilities." Conway v. Ohio Casualty Ins. Co., 669 P.2d 766, 767 (Okla. 1983).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

R.E.O., INC., d/b/a Tulsa Boat Sales Plaintiff	)	
vs.	)	Case No. 94-C-93B
TIG INSURANCE COMPANY, f/k/a Transamerica Insurance Company, and K & K INSURANCE AGENCY, INC., a/k/a K & K Insurance Group, Inc. Defendants	)	

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, R.E.O., Inc., doing business as Tulsa Boat Sales, by and through its attorney, Kathryn A. Herwig of Clark & Williams, and hereby dismisses the above-styled cause of action against the Defendant, K & K Insurance Agency, Inc., also known as K & K Insurance Group, Inc., without prejudice as to its refiling.

KATHRYN A. HERWIG, OBA #13839
Clark & Williams
5416 S. Yale, Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200

Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of January, 19 94, a true and correct copy of the above and foregoing instrument was mailed, postage thereon fully prepaid, to:

Tim N. Cheek, Esq.
Cheek, Cheek, & Cheek
311 North Harvey Avenue
Oklahoma City, OK 73102

KATHRYN A. HERWIG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 93-C-0142-E
JEROME WILSON, an individual;	)	
Defendants.	)	

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court upon Plaintiff's Motion for Summary Judgment, filed January 18, 1994. Pursuant to Order of this Court dated January 12, 1994, the defendant, Jerome Wilson ("Defendant") was given until January 31, 1994 to respond to Plaintiff's Motion for Summary Judgment. Defendant failed to file his summary judgment response by that date. Accordingly, on February 14, 1994, this Court entered an Order requiring Defendant to respond to Plaintiff's Motion for Summary Judgment on or before February 23, 1994.

On February 11, 1994, counsel for Defendant filed a Notice stating that Defendant had instructed them to take no further action in this case. Inasmuch as Defendant has failed to file a timely response to Plaintiff's Motion for Summary Judgment and, in light of the Notice filed on behalf of Defendant, does not intend to do so, the Court deems Plaintiff's Motion for Summary Judgment confessed pursuant to Local Rule 7.1(C).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is GRANTED, that Plaintiff recover from Defendant the sum of

$354,512.26, plus accrued interest in the amount of $43,415.82 (plus $177.26 per day from January 19, 1994 through the date of this Order), and postjudgment interest at the rate of _____%, and that Plaintiff is entitled to recover its reasonable attorneys fees and costs incurred in obtaining this judgment against Defendant upon application therefor.

DATED this 1 day of March, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-3-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

B.F. KELLEY, JR., individually and as Trustee under the Will of Ben F. Kelley, deceased, and MILDRED L. KELLEY,

Plaintiffs,

vs.

Case No. 92-C-1004-E

WILLIAM B. MICHAELS, PAINEWEBBER, INC. and LIBERTY BANK & TRUST COMPANY OF TULSA, N.A., in its capacity as Trustee of the Trust of Allene H. Michaels, deceased,

Defendants.

JUDGMENT

Pursuant to the Court's Order of December 10, 1993, the Court hereby enters judgment in favor of Plaintiffs, and against William B. Michaels, Allene H. Michaels Trust established pursuant to the Last Will and Testament of Allene H. Michaels (the "Trust"), and Liberty Bank & Trust Company of Tulsa, N.A. ("Liberty") as the Trustee of the Trust, as to Plaintiffs' claim for a Creditor's Bill as to any interest of William B. Michaels in the Trust.

It is ordered that a lien shall be and is hereby impressed upon any interest of William B. Michaels in the corpus or assets of the Trust, to be enforced and levied upon if and when William B. Michaels is entitled to receive a distribution of any assets from the Trust.

Liberty, as Trustee, is ordered not to make any distribution of Trust property to or for the benefit of William B. Michaels. Liberty is ordered to notify the Court, counsel for

Plaintiffs and counsel for William B. Michaels, if and when any distribution becomes or may become payable to or for the benefit of William B. Michaels. Liberty is thereafter to make any distribution to Plaintiffs, to be applied to the Judgment of the Court of May 24, 1993, in favor of Plaintiffs and against William B. Michaels, in such amounts up to and including the total amount then outstanding on said Judgment.

This Judgment is entered, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as the Court finds there is no just reason for delay as to entry of this Judgment. The Court retains jurisdiction over this matter to be exercised if and when it becomes appropriate.

DATED this 28th day of February, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL R. HOWELL,

Plaintiff,

v.

MICHAEL SHAPIRO and
KENSINGTON PRODUCTIONS

Defendants.

CASE NO. 93-C-258-B

AMENDED JUDGMENT

In accordance with a jury verdict entered January 28, 1994, in favor of Plaintiff Daniel R. Howell and against Defendant Michael Shapiro, and pursuant to Plaintiff Daniel R. Howell's Motion For Default Judgment against Defendant Kensington Productions filed January 28, 1994, Judgment is entered in favor of Plaintiff Daniel R. Howell and against Defendants Michael Shapiro and Kensington Productions now Kensington Entertainment, a California corporation, jointly and severally, in the amount of $50,000.00 with interest thereon at the rate of six per cent (6%) per annum (15 O.S. §266) from September 21, 1992 until present date, and with interest on both sums from the date hereof at the rate of 3.67 % per annum until paid. Costs and attorneys fees are assessed against the Defendants, jointly and severally, if timely applied for pursuant to Local Rule 54.1.

DATED this 1st day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL R. HOWELL,

Plaintiff,

v.

MICHAEL SHAPIRO; BURRELL COHEN; KENSINGTON PRODUCTIONS; and JACK ARMSTRONG PRODUCTIONS,

Defendants.

CASE NO. 93-C-258-B

O R D E R

This matter comes on for consideration of Plaintiff Daniel R. Howell's Motion To Amend Judgment (docket entry #30).

The history of the case is as follows: Plaintiff, an Oklahoma citizen, loaned defendants Michael Shapiro, Burrell Cohen, Kensington Productions, a corporation and Jack Armstrong, a putative corporation, California citizens all, $50,000 in July, 1990 as a loan/investment in a movie to be made by defendants called "Jack Armstrong - All American Boy".

Pursuant to the contract entered into between the parties, i.e. the "deal memo", Defendants were to repay the $50,000.00 loan on the first day of shooting the film. Plaintiff also contends the contract provided that "[s]hould for any reason what-so-ever film not proceed as planned Jack [Armstrong Productions} and Kensington [Productions] as well as Burrell Cohen and Michael Shapiro shall repay said loan no later than six months from receipt of said

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loan."

Plaintiff, claiming it appeared the movie will never be made, sought return of the investment by bringing this action. On January 28, 1994, a jury awarded Plaintiff the sum of $50,000. By instrument dated and entered January 31, 1994, the Court entered Judgment in favor of Plaintiff and against Defendants Michael Shapiro and Kensington Productions now Kensington Entertainment, a California corporation. Said Judgment provided each party is to bear its own attorneys fees.

Plaintiff seeks an Order amending the judgment to provide Plaintiff should recover attorneys fees, as prevailing party, pursuant to 12 O.S. §936 which provides:

> "In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to(sic) the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

Plaintiff argues that the loan/investment contract is essentially a note thereby implicating §936, citing Nat'l. Educ. Life Ins. Co. vs. Apache Lanes, Inc. et al, 555 P.2d 600 (Okla.1976) and Cadle Company vs. Bianco, 849 P.2d 437 (Okla. App. 1992). The Court distinguishes these cases because both involved guaranties of an existing, traditional promissory note, not present herein. However, the Court is unaware of any Oklahoma authority pro or contra on the specific issue herein.

Plaintiff cites the definition of "note" given by Black's Law

Dictionary, Fifth Edition, as follows:

> "An instrument containing an express and absolute promise of signer to pay to a specified person or order, or bearer, a definite sum of money at a specified time."

Other authorities have defined "note" thusly:

> "A note is a written promise by a certain person to pay a certain sum of money to a certain person at a certain time." Brown v. First Nat. Bank, 18 N.E. 56, 59, 115 Ind. 572, 577; Grissom v. Commercial Nat. Bank, 10 S.W. 774, 779, 87 Tenn. (3 Pickle) 350, 3 L.R.A. 273, 10 Am.St.Rep. 669. Words and Phrases, Volume 28 A, p. 468.

While of no value as a preclusion to either party, the Court notes that both Plaintiff and Defendants sought, in their pleadings, attorneys fees if prevailing parties, pursuant to §936.

The Court is of the view that Plaintiff's loan/investment contract, while neither fish nor fowl, is more note than contract thereby lending credence to §936 application. The Court concludes that the parties agreement is sufficiently a "note" to form the basis for recovery of attorneys fees to Plaintiff as the prevailing party.

The Court further concludes Plaintiff's Motion To Amend Judgment should be and the same is hereby GRANTED. An Amended Judgment in accord with this Order will be entered simultaneously herewith.

IT IS SO ORDERED, this 1st day of March, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK WHATLEY,

Plaintiff,

vs.

CITY OF BARTLESVILLE, OKLAHOMA, a municipal Corporation,

Defendant.

Case No. 92-C-719 B

ORDER TO DISMISS WITHOUT PREJUDICE

The Court having reviewed the Application to Dismiss Without Prejudice submitted, for good cause shown, finds that the relief requested should be granted.

IT IS THEREFORE ORDERED that all of Plaintiff's Remaining Causes of Action shall be dismissed, without prejudice.

DATED this 2nd day of March, 1994.

S/ THOMAS R. BRETT

The Honorable Thomas R. Brett
U.S. District Judge

Prepared by:

Pamela B. Malone, OBA #15440
MALONE, NAIFEH AND HALE, P.C.
201 West 5th Street, Suite 520
Tulsa, Oklahoma 74103
(918)584-0077

ENTERED ON DOCKET
DATE 3-2-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ANTHONY FLOYD BEAN;	)	
ELSIE MAXINE BEAN;	)	
COUNTY TREASURER, Tulsa County, Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. **92-C-440-E**

FILED
MAR 01 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28th day of February, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Anthony Floyd Bean** and **Elsie Maxine Bean**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Elsie Maxine Bean**, acknowledged receipt of Summons and Complaint on May 20, 1993; that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 22, 1992; and that Defendant, **Board of County Commissioners**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 21, 1992.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their Answers on June 10, 1992; that the Defendant, **Anthony Floyd Bean**, filed an Entry of Appearance on June 1, 1992, and also an Entry of Appearance on or about May 18, 1993, but has failed to answer and his default has therefore been entered by the Clerk of this Court; that the Defendant, **Elsie Maxine Bean**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT SEVEN (7), BLOCK TWO (2), HENSON ADDITION TO TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on October 16, 1980, Bill A. Hutsell, Jr. and Jodi A. Hutsell executed and delivered to First Continental Mortgage Co. their mortgage note in the amount of $27,850.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, Bill A. Hutsell, Jr. and Jodi A. Hutsell executed and delivered to First Continental Mortgage Co. a mortgage dated October 16, 1980, covering the above-described property. Said mortgage was recorded on

October 20, 1980, in Book 4505, Page 700, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 11, 1987, First Continental Mortgage Co. assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America L.P. This assignment was recorded on June 16, 1987, in Book 5031, Page 277, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 2, 1988, Commonwealth Mortgage Company of America L.P. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This assignment was recorded on January 18, 1989, in Book 5162, Page 305, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1988, H. Bob Pollock and Mary Jo Pollock, husband and wife, granted a General Warranty Deed covering the above-described property to the Defendants, Anthony Floyd Bean and Elsie Maxine Bean, husband and wife. This deed was recorded on July 6, 1988, in Book 5112, Page 1091, in the records of Tulsa County, Oklahoma. The Defendants, Anthony Floyd Bean and Elsie Maxine Bean, husband and wife, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on November 14, 1988, the Defendants, Anthony Floyd Bean and Elsie Maxine Bean, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding

agreements were reached between these same parties on July 20, 1989; February 23, 1990; and August 21, 1990.

The Court further finds that the Defendants, Anthony Floyd Bean and Elsie Maxine Bean, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements described above, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Anthony Floyd Bean and Elsie Maxine Bean, are indebted to the Plaintiff in the principal sum of $40,077.07, plus interest at the rate of 13 percent per annum from May 15, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, **County Treasurer** and **Board of County Commissioners**, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Anthony Floyd Bean** and **Elsie Maxine Bean**, in the principal sum of $40,077.07, plus interest at the rate of 13 percent per annum from May 15, 1992 until judgment, plus interest thereafter at the current legal rate of 3.74 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or

to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer** and **Board of County Commissioners**, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Anthony Floyd Bean** and **Elsie Maxine Bean**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under

and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

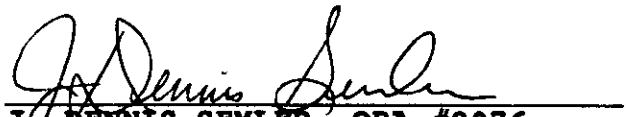
S/ [illegible] ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, OK 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 92-C-440-E

NBK:css

ENTERED ON DOCKET

DATE 3-2-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY HOOPER, and INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 943, an unincorporated labor organization,	)	
Plaintiff,	)	
vs.	)	**Case No. 93-C-917-E**
OKLAHOMA FIXTURE COMPANY, an Oklahoma Corporation,	)	
Defendant.	)	

FILED

MAR 01 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiffs, Jerry Hooper and International Brotherhood of Carpenters and Joiners of America, Local Union 943 and against the Defendant, Oklahoma Fixture Company, affirming the award of the arbitrator reinstating Hooper and granting him full back pay less any outside earnings and no loss of seniority status or benefits. Costs and attorney fees may be awarded upon proper application.

DATED this 1st day of March, 1994.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE 3-2-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADD KIMBROUGH, Plaintiff, vs. DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	)	Civil No: 93-752-E

ORDER

NOW on this 2d day of March, 1994 the Court having reviewed the Plaintiff's Motion to Dismiss, finds that this case should be dismissed with prejudice.

Judge James O. Ellison

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN EARL AMES,)
)
Plaintiff,)
)
vs.) No. 93-C-438-B
)
JIM EARP, et al.,)
)
Defendants.)

ORDER

At issue before the court in this prisoner's civil rights action are defendants' motion to dismiss which the court treated as one for summary judgment, and defendants' supplemental motion to dismiss or for summary judgment [docket #12 and #25].

I. BACKGROUND

In May 1993, plaintiff, a state inmate, filed this civil rights action against Jim Earp, Sheriff of Delaware County; Kent Vice, Undersheriff of Delaware County; Bill Strout, Deputy Sheriff; Mike Velten, Investigator of the Delaware County District Attorney's Office; and Bruce Poindexter, Howard Payton, and Delmar Harmon, Delaware County Commissioners. Plaintiff broadly alleged that defendants violated his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. [Docket #1.] In addition to his civil rights complaint, plaintiff submitted a "petition" and a "brief in support of demand for jury." [Docket #3 and #4.] In the "petition," plaintiff added as a plaintiff the Elkhorn Lounge (an establishment in which plaintiff owned an interest) and alleged that defendants conspired to injure his business at the Elkhorn

Lounge. In his "brief in support of jury demand," the plaintiff alleged that defendants unlawfully searched and seized the Elkhorn Lounge and his private residence. Plaintiff sought compensatory and punitive damages.

Defendants moved to dismiss for failure to state a claim, and plaintiff objected. On November 17, 1993, the court treated defendants motion to dismiss as one for summary judgment and granted the parties an opportunity to supplement their respective motion and response under Fed. R. Civ. P. 56. Although the defendants supplemented their motion to dismiss, the plaintiff did not respond.

II. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine

issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgement. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

III. DISCUSSION

At the outset the court notes that the Elkhorn Lounge is not a plaintiff in this action. The plaintiff neither named it in the caption nor in the body of his civil-rights-complaint form (docket #1). See Fed. R. Civ. P. 10 ("[i]n the complaint the title of the action shall include the names of all the parties"). Plaintiff's attempt to add the Elkhorn Lounge as a plaintiff in his "petition" and in his "brief in support of jury demand" [docket #3 and #4] (all filed on the same day as plaintiff's complaint], was insufficient to amend his original complaint in this action. See Fed. R. Civ. P. 15.

In any case, after liberally construing plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520 (1972), the court concludes that the defendants are entitled to judgment as a matter of law. The plaintiff has neither alleged nor shown that the Board of County Commissioner and the three individual commissioners were personally responsible for or involved in the alleged constitutional violations. See Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991) (a defendant must be personally involved in the alleged constitutional deprivation to be liable in a civil rights action). As to the remaining defendants, the plaintiff has

failed to controvert defendants' summary judgment evidence that no search was conducted at the Elkhorn Lounge and that the defendants did not participate in the search of his personal residence. See Shabazz v. Askins, No. 93-6192, slip op. at 4 (10th Cir. Jan. 24, 1994) (to defeat a motion for summary judgment the nonmoving party cannot rest on the mere allegations in his pleadings).

Even assuming plaintiff properly alleged a civil conspiracy in his "brief in support of jury demand," the court concludes that plaintiff's conclusory allegations are insufficient to state a claim. See Fed. R. Civ. P. 15. Plaintiff's complaint, brief in support, petition, and response to defendants' motion for summary judgment are simply devoid of any allegations of facts indicating a possible conspiratorial agreement or actions by the defendants. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action is insufficient to state a claim under section 1985(3)); Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide "specific facts showing agreement and concerted action" to sustain a civil rights conspiracy claim).

IV. CONCLUSIONS

After viewing the evidence in the light most favorable to the plaintiff, the court concludes that defendants have made an initial showing negating all disputed material facts, that plaintiff has failed to controvert defendants' summary judgment evidence, and

that defendants are entitled to judgement as a matter of law.

ACCORDINGLY IT IS HEREBY ORDERED that defendants' motion for summary judgment [docket #12, and #25] is **granted.**

SO ORDERED THIS 1st day of May, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANGELA ROBINSON, individually, and as parent and next friend of ERIC ROBINSON, a minor,

Plaintiffs,

-vs-

JOHN McCANTS, an individual, JOE R. McKISICK, an individual, and McKISICK DRILLING, INC., a suspended Oklahoma corporation, and RANDY McKISICK and JEANETTE McKISICK, individually and doing business as McKISICK PIER DRILLING, a partnership,

Defendants.

[redacted]

(Consolidated With)

No. 93-C-0025B

AGREED ORDER OF REMAND

NOW on this 1st day of ~~February~~ March, 1994, I the undersigned Judge of the above entitled Court, upon Application of the Plaintiff, and with concurrence of the Defendants, order the case remanded to the District Court of Mayes County Oklahoma, from whence it originated in Case No. CJ-93-16.

S/ THOMAS R. BRETT
JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT A. WARE, individually, and as surviving spouse of PAULA R. WARE, deceased,

Plaintiffs,

-vs-

JOHN McCANTS, an individual, JOE R. McKISICK, an individual, and McKISICK DRILLING, INC., a suspended Oklahoma corporation, and RANDY McKISICK and JEANETTE McKISICK, individually and doing business as McKISICK PIER DRILLING, a partnership,

Defendants.

No. 93-C-0025B

(Consolidated With)

No. 93-C-125B

ORDER OF DISMISSAL

NOW on this 1st day of ~~February,~~ March 1994, I the undersigned Judge of the above entitled Court dismiss the within and foregoing case, as having been settled by the parties as evidenced by their Application for Order of Dismissal.

S/ THOMAS R. BRETT

JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK WHATLEY, Plaintiff,	)	
vs.	)	Case No. 92-C-719 B
CITY OF BARTLESVILLE, OKLAHOMA, a municipal Corporation, Defendant.	)	

ORDER TO DISMISS WITHOUT PREJUDICE

The Court having reviewed the Application to Dismiss Without Prejudice submitted, for good cause shown, finds that the relief requested should be granted.

IT IS THEREFORE ORDERED that all of Plaintiff's Remaining Causes of Action shall be dismissed, without prejudice.

DATED this 2nd day of March, 1994.

S/ THOMAS R. BRETT
The Honorable Thomas R. Brett
U.S. District Judge

Prepared by:

Pamela B. Malone, OBA #15440
MALONE, NAIFEH AND HALE, P.C.
201 West 5th Street, Suite 520
Tulsa, Oklahoma 74103
(918)584-0077

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICKY G. WHITE,

Plaintiff(s),

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant(s).

93-C-0044-B

ORDER

Defendant Secretary of Health and Human Services ("Secretary") awarded Plaintiff Rickey G. White ("Plaintiff") disability benefits for two years. Mr. White now appeals that decision, raising two issues: (1) Whether the Administrative Law Judge erred by not applying the "medical improvement" standard, and (2) Whether substantial evidence supports the ALJ's decision.

I. Summary of Procedural History

The pertinent facts are as follows: Plaintiff applied for disability benefits on November 13, 1989, alleging he had been unable to work since July 31, 1987 due to back and chest pain. The ALJ held a hearing and, after examining the evidence, found that Plaintiff was disabled from a "closed period" of July 31, 1987 through August 1, 1989. But the ALJ concluded that Plaintiff could return to work after August 1, 1989 in jobs such as telephone sales, a clerk, and a telephone interviewer. Following the ALJ's decision, Plaintiff appealed to this Court.

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II. Legal Analysis

The issue here focuses on the "medical improvement" standard. Congress passed the 1984 Social Security Disability Amendments, Pub.L. No. 98-460, which applied to "actions relating to medical improvement" pending before courts on the date the Amendments were enacted. *Pickett v. Bowen*, 833 F.2d 288, 291 (11th Cir. 1987).In effect, the Amendment prevented the Secretary from terminating benefits unless substantial evidence shows the claimant has medically improved and is able to engage in substantial gainful activity. *42 U.S.C. §423(f).*[1].

The typical situation involving the use of the "medical improvement" standard is where one ALJ awards disability benefits to a claimant and then, after a passage of time, a second ALJ terminates those benefits in a different proceeding. In this case, however, the ALJ, determined, in one proceeding, that Plaintiff should receive benefits for only a two-year period. In essence, the ALJ, in one "full swoop", both awarded and terminated benefits at the same time -- a circumstance the case law refers to as a "closed period" case.[2]

The question, therefore, is whether a "closed period" case is one that relates to medical improvement. Stated another way, does the Secretary have to apply the "medical improvement" standard in "closed period" cases? The Secretary says no. She argues the medical improvement standard applies only where there is a separate termination of

---

[1] *Medical improvement is defined as "any decrease in the medical severity of [claimant's] impairment which was present at the time of the most recent favorable medical decision that [claimant] was disabled or continued to be disabled." 20 C.F.R. §404.1594(b)(1)*

[2] *A "closed period" is where "the decision maker determines that a new applicant for disability benefits was disabled for a finite period of time which started and stopped prior to the date of his decision." Pickett v. Bowen, 833 F.2d 289, fn. 1 (11th Cir. 1987).*

benefits. The Plaintiff, obviously, disagrees.

No mandatory precedent specifically answers the question, but cases from the Eighth and Eleventh circuits offer guidance. Both cases examine the awkward language of Section 2(d)(6) of the 1984 Disability Amendments, which states:

> **The term 'action relating to medical improvement' means an action raising the issue of whether an individual who has had his entitlement to benefits...based on disability terminated should not have had such entitlement terminated without consideration of whether there has been medical improvement...since the time of a prior determination that the individual was under a disability.**

In *Camp v. Heckler*, 780 F.2d 721 (8th Cir. 1986), the court found that Section 2(d)(6) did not apply to "closed period" cases. The court wrote:

> **As the Secretary points out, this is a case in which she determined in a single proceeding that the fact of Camp's disability, the extent of the disability, and the duration of the disability. Thus, this is not, properly speaking, a "termination" or "cessation" case, in which a claimant who was already a recipient of monthly benefits as a result of a favorable decision on a prior application is determined to be no longer disabled, and thus has had his benefits terminated as a result of a subsequent review of his disability and a new decision by a different adjudicator.**
>
> **Section 2(d)(6) of the Reform Act...contemplates that mandatory remand will take place only in cases of a prior determination that the individual was under a disability. This reference to a prior determination, we think, is more naturally read as referring to a previous decision in favor of disability, followed by claimant's receipt of benefits, further followed by a new proceeding resulting in...termination on the ground of medical improvement.** *Id. at 721.*

However, in *Pickett v. Bowen*, 833 F.2d 288 (11th Cir. 1987), the Eleventh Circuit rejected the *Camp* holding because the Eighth Circuit "read Section (2)(d)(6) too narrowly." *Id. at 293,* fn. 4. The *Pickett* court determined that the Amendment applied equally to "non-closed" and "closed" cases. **"Congress,"** the court wrote, **"enacted the**

Disability Amendments to ensure that those who deserve disability benefits receive them. Congress also sought to ensure that termination of benefits occurs only after reference to a "medical improvement." *Id. at 293.*

This Court, after review, finds the Eleventh Circuit rationale persuasive. As discussed in *Pickett*, the legislative history indicates that the 1984 Amendments were meant to restore confidence and fairness in the way the Social Security Administration handles disability claims. Consequently, a broad reading of Section 2(d)(6) which would apply the same rules in both "non-closed" and "closed period" cases - is the most consistent and fair approach. Also, from a practical standpoint, the ALJ should be required to consider medical improvement before ending disability benefits. Therefore, the undersigned concludes that the Secretary must apply the "medical improvement" standard in "closed period" cases.

In the case at bar, the ALJ failed to apply the medical improvement standard. *See, Secretary's Brief at page 4 ("The Secretary properly did not apply the medical improvement standard to this case.")* Instead, the ALJ evaluated the evidence and concluded that Plaintiff was unable to work for a two-year period from July 31, 1987 to August 1, 1989. He then concluded, without examining Plaintiff's medical improvement, that Plaintiff could return to work after August 1, 1989. Therefore, the ALJ erred and the case is **REMANDED**, for consideration of medical improvement consistent with this holding.[3]

---

[3] *This Court makes no decision on whether Plaintiff should have been judged disabled past August 1, 1989. That should be decided by the ALJ after he re-evaluates the evidence and applies the medical improvement standard. As noted in 20 C.F.R. §404.1594(b)(3), a determination of medical improvement "must be based on changes (improvement in the symptoms, signs, and/or laboratory findings associated with [the] impairment(s)." This will require a supplemental hearing where, at a minimum, a consulting physician shall testify.*

SO ORDERED THIS 28th day of October, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 3-1-94

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 93-C-1086-E**
	)	
ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) IN UNITED STATES CURRENCY, WHICH SUM IS REPRESENTED BY CHECK NUMBER 17887 DATED NOVEMBER 24, 1993, ISSUED BY RIVERSIDE CHEVROLET AND PAYABLE TO UNITED STATES TREASURY FORFEITURE FUND,	)	
	)	
Defendant.	)	

JUDGMENT OF FORFEITURE
BY DEFAULT AND BY AGREEMENT

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Agreement against the defendant currency and all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 6th day of December 1993, alleging that the defendant currency was subject to forfeiture pursuant to 18 U.S.C. § 981 and Settlement Agreement entered into between the United States of America and Riverside Chevrolet, Incorporated.

Warrant of Arrest and Notice In Rem was issued on the 6th day of December 1993, by Clerk of this Court to the United States Marshal for the Northern District of Oklahoma.

On November 24, 1993, the plaintiff and Riverside Chevrolet, Inc. entered into a Settlement Agreement, whereby Riverside Chevrolet consented to the entry of an order of forfeiture, forfeiting the defendant currency.

On the 17th day of December 1993, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, with the Settlement Agreement attached, and the Warrant of Arrest and Notice In Rem on the defendant currency, to-wit:

ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) IN UNITED STATES CURRENCY, WHICH SUM IS REPRESENTED BY CHECK NUMBER 17887 DATED NOVEMBER 24, 1993, ISSUED BY RIVERSIDE CHEVROLET AND PAYABLE TO UNITED STATES TREASURY FORFEITURE FUND.

That the following officers and entity were determined to be potential claimants in this action with possible standing to file a claim herein, and were served in this action with Notice of Lawsuit and Request for Waiver of Service for Summons by mailing to their attorney, Phil Frazier, who subsequently executed Waiver of Service of Summons on behalf of each potential claimant, as follows:

Riverside Chevrolet, Inc.	Waiver of Service of Summons executed by Phil Frazier, Attorney for Riverside, on December 18, 1993; Filed February 9, 1994.

David Hudiburg President, Riverside Chevrolet, Inc.	Waiver of Service of Summons executed by Phil Frazier, Attorney for Riverside, on December 18, 1993; Filed February 9, 1994.
Rod Maupin Secretary, Riverside Chevrolet, Inc.	Waiver of Service of Summons executed by Phil Frazier, Attorney for Rod Maupin, on December 18, 1993; Filed February 9, 1994.

That USMS 285s reflecting the service upon the defendant currency and the Waivers of Service of Summons set forth above are all on file herein.

That all persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, the receipt of the Notice of Lawsuit and Request for Waiver of Service for Summons, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

That no other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by

advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency is located, on January 20 and 27 and February 4, 1994. Proof of Publication was filed February 9, 1994.

That no other claims in respect to the defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant currency, and all persons and/or entities interested therein, except Riverside Chevrolet, Incorporated, which has entered into a Settlement Agreement on November 24, 1993, for payment of and forfeiture of the defendant currency, and whereby Riverside Chevrolet consented to the entry of an order of forfeiture, forfeiting the defendant currency. The Settlement Agreement was attached to the Complaint filed herein on December 6, 1993, and made a part thereof by reference.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant currency:

ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) IN UNITED STATES CURRENCY, WHICH SUM IS REPRESENTED BY CHECK NUMBER 17887 DATED NOVEMBER 24, 1993, ISSUED BY RIVERSIDE CHEVROLET AND PAYABLE TO UNITED STATES TREASURY FORFEITURE FUND,

and that such currency be, and it is, forfeited to the United States of America for disposition according to law.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Chief Judge of the United States District Court

APPROVED AS TO FORM:

CATHERINE DEPEW HART
Assistant United States Attorney

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